(1)

No. 92-515

In The
Supreme Court of the United States

October Term, 1992

STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Wisconsin

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX TO PETITION

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QUESTION PRESENTED

Does the First Amendment to the United States Constitution prohibit states from providing greater maximum penalties for crimes if a fact-finder determines that a criminal offender intentionally selected his or her crime victim because of the victim's race, color, religion or other specified status?

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PETITION FOR A WRIT OF CERTIORARI AND
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PARTIES

The petitioner is the State of Wisconsin. The respondent is Todd Mitchell, an individual convicted of felony aggravated battery with penalty enhancement under the statute at issue here.

OPINIONS BELOW

The majority and dissenting opinions of the Wisconsin Supreme Court are set forth in the Appendix (A.1-52) and

are reported at *State v. Mitchell*, 169 Wis. 2d 153, 485 N.W.2d 807 (1992). The decision of the Wisconsin Court of Appeals is set forth in the Appendix (A.53–62) and reported at *State v. Mitchell*, 163 Wis. 2d 652, 473 N.W.2d 1 (Ct. App. 1991). The final trial court decision is set forth in the Appendix (A.63–71).

JURISDICTION OF THIS COURT

The State of Wisconsin seeks review of a final decision of the Wisconsin Supreme Court, rendered on June 23, 1992. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

United States Constitution, Amendment 1
United States Constitution, Amendment 14, Section 1
Wis. Stat. § 939.645 (1989–90)

These constitutional and statutory provisions are set forth in the Appendix (A.72–73).

STATEMENT OF THE CASE

Statement of Facts Supporting the Conviction

The pertinent facts were summarized by the Wisconsin Supreme Court:

> The facts are not in dispute. On October 7, 1989, a group of young black men and boys was gathered at an apartment complex in Kenosha. Todd Mitchell, nineteen at the time, was one of the older members of the group. Some of the group were at one point

> discussing a scene from the movie "Mississippi Burning" where a white man beat a young black boy who was praying.
>
> Approximately ten members of the group moved outdoors, still talking about the movie. Mitchell asked the group: "Do you all feel hyped up to move on some white people?" A short time later, Gregory Riddick, a fourteen-year-old white male, approached the apartment complex. Riddick said nothing to the group, and merely walked by on the other side of the street. Mitchell then said: "You all want to fuck somebody up? There goes a white boy; go get him." Mitchell then counted to three and pointed the group in Riddick's direction.
>
> The group ran towards Riddick, knocked him to the ground, beat him severely, and stole his "British Knights" tennis shoes. The police found Riddick unconscious a short while later. He remained in a coma for four days in the hospital, and the record indicates he suffered extensive injuries and possibly permanent brain damage.

(A.3).

Description of the Penalty Enhancement Statute and Summary of the Proceedings Below

Mitchell was charged with and convicted of felony aggravated battery as a party to a crime. The State alleged and proved that Mitchell was liable for sentence enhancement for the battery under Wis. Stat. § 939.645 (1989–90), Wisconsin's penalty enhancement statute for crimes directed at persons because of their status. Mitchell was also charged with and convicted of theft as a party to a crime. But the jury determined that the State did not

meet its burden under the penalty enhancement statute with regard to that offense and, therefore, the theft conviction is not at issue here.

The Wisconsin penalty enhancement law is entitled: **"Penalty; crimes committed against certain people or property."** It authorizes increased penalties for all crimes in the Wisconsin Criminal Code if the perpetrator "[i]ntentionally selects the person against whom the crime . . . is committed or selects the property which is damaged or otherwise affected by the crime . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property." Wis. Stat. § 939.645(1)(b) (A.72–73).

The statute does not increase minimum penalties; it increases the available maximum penalties.[1] A sentencing judge must still determine whether penalty enhancement is appropriate in a particular case.

A prerequisite to enhancement of the available penalties is the commission of a crime. A trier of fact must first find, beyond a reasonable doubt, that a defendant committed each element of a crime. Wis. Stat. § 939.645(1)(a). The fact-finder then separately renders a "special verdict" on whether the State has proven, beyond a reasonable doubt, "intentional selection" of the crime

[1]Although the statute does not increase the minimum penalties for any crimes, it does direct that Class A misdemeanors become felonies. Wis. Stat. § 939.645(2)(b). Thus, while the language of this subsection leaves some doubt as to whether this change in status is automatic, and while the sentencing judge remains free to impose no fine and no period of incarceration, subsection (2)(b) may constitute a single exception to the rule that the penalty enhancer statute merely gives a judge more discretion to impose an appropriate sentence. Regardless, this portion of the statute has no application to Mitchell.

victim under the penalty enhancement law. Wis. Stat. § 939.645(3).

The penalty enhancer does not require a showing of any particular motive for the intentional discriminatory selection. Rather, the State must prove the defendant "intentionally selected" the victim "because of" the victim's race, color or other listed status. Evidence of an underlying motive, such as racial hatred, may be relevant to whether intentional selection occurred, but the State is not required to prove any particular motive.

Following the presentation of evidence at Mitchell's trial, the jury found him guilty of felony aggravated battery. The jury separately found that Mitchell had intentionally selected his battery victim because of the victim's race (trial transcript at 114–15). This separate finding increased the maximum penalties Mitchell faced for the felony battery. Mitchell's exposure to a maximum two-year sentence for the underlying crime was increased by five years. The judge imposed a four-year prison sentence.

Mitchell brought a direct appeal to the Wisconsin Court of Appeals. He claimed the penalty enhancer was unconstitutionally vague and overbroad and that it violated his equal protection rights. The court of appeals rejected his vagueness and overbreadth challenges and found the equal protection claim waived (A.55, 59–61).

Mitchell appealed to the Wisconsin Supreme Court. A divided court resolved Mitchell's overbreadth claim by finding that the penalty enhancer punished thought in violation of the First Amendment and was overbroad because it chilled free speech (A.16, 19). The majority opinion did not address Mitchell's vagueness or equal protection claims.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD ADDRESS THE FIRST AMENDMENT ISSUE PRESENTED TO RESOLVE A CONFLICT AMONG STATE COURTS, TO PROVIDE GUIDANCE TO STATES IN THEIR EFFORTS TO DEAL WITH "HATE CRIMES" AND TO REJECT A VIEW OF THE FIRST AMENDMENT WHICH UNDERMINES ALL ANTI-DISCRIMINATION LAWS.

The State of Wisconsin, like other states and the federal government, battles discrimination on many fronts. Wisconsin has a variety of civil statutes, in areas such as housing and employment, which proscribe discrimination against persons because of characteristics having nothing to do with their qualifications. These forms of discrimination are prohibited and sanctioned because of the harm they inflict on individuals and our society as a whole.

But discriminatory acts and the laws prohibiting them are not limited to the civil arena. There are, for example, federal laws that criminalize discriminatory acts. *See, e.g.*, 18 U.S.C. § 245 and 42 U.S.C. § 3631. And, to the point here, many crimes are committed because the perpetrator wishes to hurt a member of a particular identifiable group. When discriminatory selection prompts a criminal act, additional harms are frequently present. These discrimination crimes terrorize individual victims and tear at our social fabric by spreading fear and distrust and by provoking retaliation.

Wisconsin and other states have chosen to deal with this distinct societal problem by enacting laws that enhance penalties applicable when a crime is committed because of the victim's status. Wisconsin's law is loosely patterned on model legislation developed by the Anti-

Defamation League of B'nai B'rith.[2] Over twenty states have similar laws.[3]

Although the state statutes vary in their approach, most have a core feature in common: they authorize increased or additional penalties for what is already criminal conduct if the offender commits a crime because of the race, color,

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[2]The pertinent Anti-Defamation League model reads:

2. Intimidation

A. A person commits the crime of intimidation if, by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals, he violates Section _____ of the Penal Code (insert code provision for criminal trespass, criminal mischief, harassment, menacing, assault and/or other appropriate statutorily proscribed criminal conduct).

B. Intimidation is a _____ misdemeanor/felony (the degree of the criminal liability should be at least one degree more serious than that imposed for commission of the offense).

ADL Law Report, *Hate Crimes Statutes: A 1991 Status Report*, at 4.

[3]A listing of similar state statutes is in the Appendix (A.74-75). Also, it is noteworthy that Congress is presently considering a law which, while distinguishable from the Wisconsin law, raises the same First Amendment issue. The proposed "Hate Crimes Sentencing Enhancement Act of 1992" would direct the creation of a new sentencing guideline that enhances the offense level for "hate crimes." *See* H.R. 4797, introduced April 7, 1992 and S.R. 2522 introduced April 2, 1992 (A.76-79). A "hate crime" would be "a crime in which the defendant's conduct was motivated by hatred, bias, or prejudice based on the actual or perceived race, color, religion, national origin, ethnicity, gender, or sexual orientation of another individual or group of individuals." (A.77).

religion, or other specified status of the victim. It is this feature which has been erroneously analyzed under the First Amendment by the *Mitchell* court.

The *Mitchell* court compounded its error by misreading this Court's recent decision in *R.A.V. v. City of St. Paul, Minnesota*, 112 S. Ct. 2538 (1992), and by ignoring the teaching of *Dawson v. Delaware*, 112 S. Ct. 1093 (1992). The *Mitchell* court failed to appreciate that under *R.A.V.*, the Wisconsin law is properly directed at the effects of conduct, not at speech or thought. The *Mitchell* decision also conflicts with the pronouncement in *Dawson* that relevant motivations for crimes may play a role in setting punishment. These conflicts are more fully explored below.

Since the *Mitchell* decision was issued, two other state supreme courts have addressed the First Amendment issue and come to opposite conclusions. The Ohio Supreme Court agreed with Wisconsin's high court and found that a comparable Ohio law impermissibly punishes thought. *State v. Wyant*, Case Nos. 91-199, 91-1519 and 91-1211/91-1589 (Ohio, August 26, 1992) (A.80-103). A day later the Oregon Supreme Court expressly disagreed with the Wisconsin court and held that an analogous Oregon law constitutionally proscribed a forbidden effect and was not directed at opinions or at speech on the basis of expressive content. *State v. Plowman*, Case No. S38328 (Ore. August 27, 1992) (A.104-118).[4]

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[4]Prior to the state supreme court decisions in *Mitchell*, *Wyant*, and *Plowman*, several lower state courts had reached conflicting conclusions. Some courts upheld laws against First Amendment challenges. *State v. Hendrix*, 107 Or. App. 734, 813 P.2d 1115, 1119 (1991), *State v. Beebe*, 67 Or. App. 738, 680 P.2d 11 (1984), *State v. Wyant*, 1990 Ohio App. LEXIS 5589, and *People v. Grupe*, 141 Misc. 2d 6, 532 N.Y.S.2d 815, 820 (1988). Others found the laws to be in violation of the First Amendment. *State v. Mitchell*, 163 Wis. 2d 652, 473 N.W.2d 1 (Ct. App. 1991) (A.53) and *State v. Van Gundy*, 64 Ohio St. 3d 230, 594 N.E.2d

There is no consensus building in the courts below. Action by this Court now will eliminate the need for much of the litigation in this area, thus allowing states to proceed with proper efforts to deter and punish crimes prompted by a discriminatory motive or intent.

Perhaps more important than the effect these conflicting state court decisions have on "hate crime" laws, is their potential effect on the decades old body of federal and state anti-discrimination law. The operative language of the law at issue here is identical to traditional state and federal anti-discrimination laws. The role of motive in the penalty enhancement laws is the very same as the role of discriminatory motive in these other anti-discrimination laws. Thus, as will be developed more fully below, the *Mitchell* decision and its First Amendment analysis undermines virtually all criminal and civil anti-discrimination laws.

A decision from this Court is needed to resolve whether the *Mitchell* majority has correctly interpreted the First Amendment as it relates to penalty enhancement for crimes prompted by discrimination. This question affects not only numerous state "hate crime" laws, but nearly all state and federal anti-discrimination laws as well.

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604 (1992). In addition, the constitutionality of the Vermont law has been challenged in *State v. LaDue*, No. 91-313, now pending before that state's supreme court.

II. THE WISCONSIN SUPREME COURT'S CONCLUSION THAT THE PENALTY ENHANCEMENT STATUTE VIOLATES THE FIRST AMENDMENT PRESENTS A SUBSTANTIAL QUESTION OF FEDERAL CONSTITUTIONAL LAW AND CONFLICTS WITH THIS COURT'S DECISIONS IN *DAWSON v. DELAWARE* AND *R.A.V. v. CITY OF ST. PAUL.*

A. The Wisconsin Supreme Court's conclusion that consideration of motive is constitutionally impermissible in the context of a "hate crime" penalty enhancer is inconsistent with this Court's decision in *Dawson v. Delaware*.

In *Dawson*, a white defendant was convicted of murdering a white female. There was no racial motivation for the murder. This Court held that Dawson's First Amendment rights were violated at sentencing when the government introduced a short stipulation regarding Dawson's membership in a "racist prison gang" called the "Aryan Brotherhood." Admission of the stipulation was improper because there was no demonstrated connection between Dawson's gang membership and his crime or a relevant sentencing factor. *Id.* at 1097-98. This Court explained that "Dawson's First Amendment rights were violated by the admission of the Aryan Brotherhood evidence . . . because the evidence proved nothing more than Dawson's abstract beliefs." *Dawson*, 112 S. Ct. at 1098.

At the same time, this Court made clear there is no "*per se* barrier to the admission of evidence concerning one's beliefs . . . at sentencing simply because those beliefs . . . are protected by the First Amendment." *Id.* at 1097. Thus, this Court indicated the result in *Dawson* might

have been different if, for example, "elements of racial hatred" were involved in the killing. *Id.* at 1098.[5]

Dawson teaches that when a criminal's racial beliefs are relevant to a racial hate motive for committing a crime, evidence of such beliefs is admissible at sentencing because a criminal's racial hate motivation is a proper aggravating circumstance in determining appropriate criminal punishment. *Id.* This principle is in direct conflict with the First Amendment analysis in *Mitchell*.

The *Mitchell* majority begins well enough by stating that the First Amendment protects not only speech, but also thought, no matter how abhorrent (A.7-8). But the court then assumes, without true analysis, that a motive for an executed crime is the same as pure thought for First Amendment purposes. This equating of pure thought with motivation for a criminal act leads to the court's startling conclusion that the motivation for an executed crime is "entitled to the full protection of the First Amendment." (A.14-15 n.15).

The *Mitchell* court's view fails to recognize that motivation for a crime is not abstract thought, but something inextricable from the criminal conduct. Motivation is no more "pure thought" than a criminal's intent to kill which, all by itself, transforms a lesser

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[5]The *Dawson* decision relies on *Barclay v. Florida*, 463 U.S. 939 (1983). In *Barclay*, a sentencing judge discussed the racial motive for the murder the defendant committed and compared it with his own experience in World War II. *Id.* at 948. A plurality of this Court approved consideration of the defendant's underlying motives ("racial hatred" and a "desire to start a race war") because they were relevant to proper sentencing factors. *Id.* at 949; *see also Dawson*, 112 S. Ct. at 1097. As a concluding comment the plurality stated: "It is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing." *Barclay*, 463 U.S. at 950.

homicide into first degree murder. The victim of a first degree murder and the victim of a lesser homicide are just as dead. Still, we look into a defendant's mind to differentiate levels of homicide. If this exploration of the mind reveals that death was the desired result, a greater penalty is available.

Of course in criminal law, as in discrimination law, conduct can be prohibited solely on the basis of motive. In Wisconsin it is a crime to intentionally touch the genitals of an infant "if that intentional touching is either for the purpose of sexually degrading or sexually humiliating the [victim] or sexually arousing or gratifying the defendant." Wis. Stats. §§ 948.01(5) and 948.02(2) (1989-90). Thus, the sole difference between a legal act of bathing an infant's genitals and a sexual assault is the motive of the actor. Regardless whether it is labeled "purpose," "motive" or "intent," it is the desire of the actor that dictates whether the act is criminal.

To date, criminal jurisprudence has assumed that motive is a proper sentencing consideration and, therefore, sentencing judges have routinely considered motive when imposing sentences. For example, a robber certainly has a constitutional right to think greedy thoughts, but a judge may still reasonably determine that a robber motivated by a desire to feed his family is less culpable than a robber motivated by a desire to wear gold jewelry.

Accordingly, it was no surprise when this Court indicated in *Dawson* that evidence of racist beliefs may be properly considered at sentencing if a defendant commits a racially motivated murder.

The *Mitchell* court attempts to avoid a direct conflict with *Dawson* by asserting there is a difference between sentencing within the parameters of existing penalties for a crime and enhancing the penalties for that crime (A.16-17 n.17). The *Mitchell* court seems to believe that the logic

of this proffered distinction speaks for itself. It does not. If a motivation for an executed crime is "thought," fully protected by the First Amendment (as the *Mitchell* court asserts), there is no reason why such "thought" should enjoy less protection in the context of a sentencing conducted within the penalty range for an underlying crime than it enjoys in the penalty enhancement context. In each case, the motivation for the criminal act is the reason a defendant receives a longer sentence than would otherwise have been imposed.

Furthermore, sentencing is a power shared by the legislative and judicial branches. *Mistretta v. United States*, 488 U.S. 361, 364 (1989); *State v. Borrell*, 167 Wis. 2d 749, 767-77, 482 N.W.2d 883, 889-94 (1992). If a sentencing judge may properly consider motive, there is no reason why a legislature may not set the stage for this consideration by enacting a penalty enhancement statute geared toward that proper consideration.

Therefore, the *Mitchell* case directly presents First Amendment questions the *Dawson* case did not: first, whether states may provide for enhanced penalties for criminal acts when the state proves the offender selected the victim because of the victim's status, and, second, whether enhanced penalties may be imposed based on the motive which prompts the selection of the victim.

B. Because the Wisconsin Supreme Court misinterpreted *R.A.V.*, this case presents an opportunity to clarify the meaning of the First Amendment as it applies to laws that deter criminal conduct directed at certain groups.

1. Under the rationale of *R.A.V.*, the Wisconsin penalty enhancer does not offend the First Amendment because it is not directed at the content of any expression or belief; rather, it regulates criminal conduct directed at certain groups.

In *R.A.V.*, the St. Paul ordinance under review prohibited a subset of expressive "fighting words" based on the content of the expression. The St. Paul City Council singled out and prohibited only those "fighting words" that communicated certain types of group hatred. *Id.* at 2548. The Court held that this approach ran afoul of the First Amendment's "'content discrimination' limitation upon a State's prohibition of proscribable speech." *Id.* at 2545.

The question presented to the *Mitchell* court was as follows: may a legislature differentiate the severity of criminal acts based on whether a crime is targeted at a victim because of the victim's status, such as race? The *Mitchell* majority and at least some of the media read *R.A.V.* as supplying a "no" answer to this question (A.15-16).[6] The petitioner disagrees. In *R.A.V.* this Court

[6]For example, the day after the *R.A.V.* decision was issued, the *New York Times* printed an analysis by Linda Greenhouse which predicted that the *R.A.V.* decision "was probably a fatal constitutional blow" at state penalty enhancement statutes. Linda Greenhouse, *High Court Voids Law Singling Out Crimes of Hatred*, New York Times, June 23, 1992, at A17.

"emphasized" that the constitutionally invalid St. Paul ordinance:

> is not a prohibition of fighting words that are directed at certain persons or groups (which would be *facially* valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition of fighting words that contain . . . *messages* of 'bias-motivated' hatred.

Id. at 2548 (emphasis added). This language is tailor-made for the Wisconsin penalty enhancer. Substituting the word "crimes" for the term "fighting words," what Wisconsin has done is to single out "crimes that are directed at certain persons or groups . . .." No particular message differentiates these crimes from other crimes. Rather, the difference is discrimination in the victim selection process.

Thus, there is a fundamental difference between the St. Paul ordinance and the Wisconsin penalty enhancer. The St. Paul ordinance was directed at expression. It differentiated prohibited from non-prohibited expression based on the content of messages conveyed. The Wisconsin enhancer, in contrast, is directed at discriminatory criminal conduct. It differentiates based on whether the criminal act is targeted at an individual because of the person's status. The Wisconsin law does not single out any type of message a criminal might communicate by his or her crime.[7]

[7]Petitioner does not believe that the Wisconsin law is a content-based law, but even if it is, the law is permissible because it serves a compelling state interest and is "necessary" to serve that interest. *Burson v. Freeman*, 112 S. Ct. 1846, 1851-52 (1992); *R.A.V.*, 112 S. Ct. at 2549-50. There is no doubt that a state has a compelling interest in eradicating discrimination against its citizens. *See Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). The purpose of the Wisconsin

2. The Wisconsin penalty enhancer satisfies, at least by analogy, two of the exceptions listed in the *R.A.V.* decision.

In *R.A.V.* this Court provided a nonexhaustive list of three exceptions for laws that accord differential treatment to "content-defined" subclasses of proscribable speech. *R.A.V.*, 112 S. Ct. at 2546. Assuming that the reasoning of *R.A.V.*, including these exceptions, applies when the underlying prohibited activity is criminal conduct, not speech, the Wisconsin penalty enhancer fits at least two of the three listed exceptions.

One *R.A.V.* exception is for subclasses that are "associated with particular 'secondary effects'" so that the regulation is "*justified* without reference to the content of the . . . speech.'" *R.A.V.*, 112 S. Ct. at 2546. The petitioner reads this exception as permitting subclass differentiation when legislation does not target a right protected by the First Amendment, but aims at conduct which produces a particular harm. The Wisconsin penalty enhancer complies with the "secondary effects" exception because it does not target messages or thoughts. It aims at a particular type of discriminatory conduct.

The *Mitchell* court overlooks the special harm caused by the unique class of crimes covered by the penalty enhancer. These crimes are unique because they affect not only the immediate victim, but also other members of the targeted group. For example, a racist attack on one member of a racial group spreads fear and resentment among other

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penalty enhancer is to deter acts of violence and other crimes directed at citizens because of their status; that is, to deter discrimination which takes criminal form. The law is necessary because enhanced penalties create greater deterrence, lead to increased public protection by allowing a longer quarantine period for the offender, and allow for the imposition of punishment appropriate to the more serious crime.

members of the targeted race. Moreover, these crimes have a special tendency to provoke retaliation.

What the *Mitchell* court ignores is that enhanced maximum penalties act as an enhanced deterrent for the class of heinous crimes covered by the Wisconsin law. Governments may not punish or deter ideas or beliefs, but governments can and should address harms caused by beliefs which are put into criminal action.

Another exception in *R.A.V.* applies when "the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." *Id.* at 2547. Suppression of ideas can be accomplished by a law that either directly punishes activities protected by the First Amendment or has a chilling effect on such activities. The petitioner has already demonstrated that the Wisconsin law is directed at criminal conduct; it does not punish thought or activities protected by the First Amendment. Here, petitioner will explain how the *Mitchell* court erred in its constitutional analysis relating to the chilling effect of the Wisconsin law.

The Wisconsin penalty enhancer does not chill protected First Amendment activities because it does nothing to change the manner in which evidence of such activities is used against criminal defendants. Evidence of activities protected by the First Amendment has long been used against parties in both civil and criminal actions to prove motive, intent or other contested issues.[8] And, as noted

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[8]Courts admit relevant speech and association evidence both with and without explicit consideration of its impact on First Amendment rights. *See, e.g., United States v. Skillman*, 922 F.2d 1370 (9th Cir. 1990) (evidence in discrimination crime prosecution that defendant asked to join a "skinhead" picnic admitted to show defendant would act on racial beliefs); *United States v. Ebens*, 800 F.2d 1422, 1427 (6th Cir. 1986) (evidence of anti-Oriental statements used to prove racial motive for killing);

above, use of evidence of associational activity against a defendant at the sentencing stage has been approved by this Court. *See Dawson*, 112 S. Ct. at 1097.

The routine use of speech evidence leads to an observation the *Mitchell* majority has steadfastly ignored. That is, *even in the absence of the penalty enhancer*, Todd Mitchell's speech in this very case would have been admitted at his trial to prove the intent element of aggravated battery and to prove his motive for directing the attack. Moreover, Mitchell's words could have been introduced at sentencing to shed light on the true nature of his crime, his character as it relates to the crime, the danger he poses to the community and other relevant sentencing considerations.

Because enactment of the Wisconsin penalty enhancer did not alter the power of the State to use speech (or even motive) against criminal defendants, there is no reason to believe that the "official suppression of ideas is afoot." *R.A.V.*, 112 S. Ct. at 2547. Certainly a government may not prohibit beliefs or ideas because they are disfavored. But nothing in the Constitution requires governmental apathy toward the special harms of bias-motivated action. Such acts "are not shielded from regulation merely because

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United States v. Redwine, 715 F.2d 315 (7th Cir. 1983), *cert. denied*, 467 U.S. 1216 (1984) (defendant's prior statements used to prove that he acted with racial intent when firebombing the home of a black family); *United States v. Franklin*, 704 F.2d 1183 (10th Cir.), *cert. denied*, 464 U.S. 845 (1983) (speech evidence showing defendant hated blacks offered to prove racial motive); *see also United States v. Gilbert*, 884 F.2d 454 (9th Cir. 1989), *cert. denied*, 493 U.S. 1082 (1990). Likewise, courts exclude such evidence when it lacks relevancy. *See, e.g., Ebens*, 800 F.2d at 1432-33 (trial court erred in admitting racial statements because they were too general and too remote in time); *United States v. McCrea*, 583 F.2d 1083, 1086 (9th Cir. 1978) (trial court erred in admitting two books into evidence).

they express a discriminatory idea or philosophy." *R.A.V.*, 112 S. Ct. at 2547.[9]

C. The Wisconsin Supreme Court's conclusion that the First Amendment protects motivation for actions calls into question the validity of all federal and state anti-discrimination laws that premise liability on proof that an action was taken "because of" a particular status of the victim.

The operative language of the Wisconsin penalty enhancer is identical to many state and federal anti-discrimination laws. These laws impose liability when an actor takes some action "because of" the race, religion or other specified status of the affected person. *See, e.g.*, Title VII as amended by § 2000e-2(a)(1) (prohibiting various employment actions "because of [the employe's] race, color, religion, sex, or national origin"); 42 U.S.C. § 3604 (prohibiting interference with housing choices "because of [the victim's] race, color," or other listed status); and Wis. Stats. §§ 111.321-322 (prohibiting employment actions "because of" age, race, or other listed status). Consequently, many of the reasons the *Mitchell* majority finds the Wisconsin penalty enhancer unconstitutional would, if valid, apply with equal or perhaps greater force to anti-discrimination laws on the local and national level.

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[9]The *Mitchell* court's erroneous "chilling effect" analysis is also inconsistent with the statement in *Dawson* that beliefs and activities protected by the First Amendment may be considered at sentencing. If the *Mitchell* court were correct, this Court in *Dawson* should have held that evidence of activities protected by the First Amendment is inadmissible at sentencing because admission has a chilling effect on the exercise of such rights.

The *Mitchell* majority fails to answer telling questions posed by dissenting justice William Bablitch:

> How can the Constitution not protect discrimination in the selection of a victim for discriminatory hiring, firing, or promotional practices, and at the same time protect discrimination in the selection of a victim for criminal activity? How can the Constitution protect discrimination in the performance of an illegal act and not protect discrimination in the performance of an otherwise legal act? How can the Constitution not protect discrimination in the marketplace when the action is taken "because of" the victim's status, and at the same time protect discrimination in a street or back alley when the criminal action is taken "because of" the victim's status?

(A.27, Bablitch, J., dissenting). While the *Mitchell* majority does not answer these questions, it does attempt to distinguish the penalty enhancer from other anti-discrimination laws.

The *Mitchell* court admits, as it must, that anti-discrimination laws are "concerned" with motive. But the court then states: "it is the objective conduct taken in respect to the victim which is redressed (not punished) by those statutes, not the actor's motive (A.20-21 n.21). This statement contains two assertions: first, that the motivation of the offender does not affect the sanction imposed and, second, that civil anti-discrimination laws do not carry punitive sanctions. Both assertions are wrong.

First, the motive of a civil rights law violator may subject him or her to additional sanctions. For example, under 42 U.S.C. §§ 1981 and 1983, a prevailing plaintiff may, in addition to other remedies, receive punitive damages if the defendant's conduct is shown to be motivated by malice, "evil motive or intent, or when it involves reckless or callous indifference to the federally

protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983); *Stephens v. South Atlantic Canners, Inc.*, 848 F.2d 484, 489 (4th Cir.), *cert. denied*, 488 U.S. 996 (1988). This issue "typically demands inquiry into the actor's subjective motive and purpose." *Smith*, 461 U.S. at 61-64 (Rehnquist, J., dissenting).

Second, contrary to the *Mitchell* court's assertion that other civil discrimination laws redress, not punish (A.20-21 n.21), punitive damages *are* awarded to punish defendants for conduct and to deter them from similar conduct in the future. *Smith*, 461 U.S. at 54, relying on Restatement (Second) of Torts § 908(1) (1979). In fact, Chief Justice Rehnquist has noted that punitive damages are "'quasi-criminal'" in nature. *Smith*, 103 U.S. at 59, quoting *Huber v. Teuber*, 10 D.C. 484, 490 (1877).

Another distinction the *Mitchell* majority relies on is its assertion that anti-discrimination laws, such as Title VII, carry only civil penalties in contrast with the penalty enhancer, which increases a criminal penalty (A.21). *Mitchell*, 169 Wis. 2d at 177, 485 N.W.2d at 817. However, this "distinction" ignores federal anti-discrimination laws that carry criminal penalties. *See, e.g.*, 18 U.S.C. § 245 (prohibiting interference with certain rights "because of [the victim's] race, color, religion or national origin") and 42 U.S.C. § 3631 (criminalizing interference with housing choices "because of" a listed status of the victim).

The *Mitchell* majority has failed to recognize the penalty enhancer for what it is: an anti-discrimination statute similar in structure and purpose to many existing anti-discrimination statutes which have repeatedly been upheld by this and other courts for decades. The Wisconsin penalty enhancer and traditional anti-discrimination laws ask the same question: did the perpetrator select the victim for a negative action because of the victim's status? To answer that question, the Wisconsin penalty enhancer and other anti-discrimination laws frequently look to the very

same evidence: the beliefs, speech and associations of the perpetrator.

The *Mitchell* decision jeopardizes our nation's body of anti-discrimination laws. The logical extension of the decision is that all anti-discrimination laws unconstitutionally punish thought and chill First Amendment rights. It follows that if *Mitchell* is allowed to stand, it will cast a dark cloud over all anti-discrimination laws in this country. Nearly a century of anti-discrimination legislation may begin to fall to similar attacks.

CONCLUSION

The petitioner's position is aptly summarized in the dissent of Wisconsin Supreme Court Justice Shirley Abrahamson. Justice Abrahamson writes:

> Bigots are free to think and express themselves as they wish, except that they may not engage in criminal conduct in furtherance of their beliefs. [The Wisconsin penalty enhancer] does not punish abstract beliefs or speech. The defendant's beliefs or speech are only relevant as they relate directly to the commission of a crime.

(A.25, Abrahamson, J., dissenting).

This Court should act now to true the course of constitutional analysis with regard to First Amendment limitations on the states' authority to enact penalty enhancement statutes to deal with the unique harm posed

by "hate crimes." Dozens of states hope to continue their fight against discrimination with the help of such laws and they await this Court's pronouncement.

Respectfully submitted,

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APPENDIX

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169 Wis. 2d 153
STATE of Wisconsin,
Plaintiff-Respondent,

v.

Todd MITCHELL,
Defendant-Appellant-Petitioner.
Supreme Court

No. 90-2474-CR. Oral argument February 26, 1992.
Decided June 23, 1992

(Reversing and remanding,
163 Wis. 2d 652, 473 N.W.2d 1
(Ct. App. 1991).)

(Also reported in 485 N.W.2d 807.)

REVIEW of a decision of the Court of Appeals. *Reversed and remanded.*

HEFFERNAN, CHIEF JUSTICE. This is a review of a published decision of the court of appeals, *State v. Mitchell*, 163 Wis. 2d 652, 473 N.W.2d 1 (Ct. App. 1991), which affirmed judgments of the circuit court for Kenosha county, Jerold W. Breitenbach, Circuit Judge, adjudging Todd Mitchell guilty of aggravated battery, party to a crime, and adjudging that Mitchell intentionally selected the battery victim because of the victim's race in violation of the hate crimes penalty enhancer, sec. 939.645, Stats. Mitchell challenged the constitutionality of the sec. 939.645, Stats., on appeal, and the court of appeals held that the statute was constitutional. We conclude that the statute unconstitutionally infringes upon free speech, and reverse the decision of the court of appeals.

The sole issue before the court is the constitutionality of sec. 939.645, Stats., the "hate crimes" statute.[1] Mitchell asserts that the statute on its face violates: (1) his right of free speech guaranteed by the First Amendment and (2) his right to due process and equal protection of the laws

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[1]At the time of Mitchell's crimes, sec. 939.645, Stats. 1989-90, provided:

> (1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):
>
> (a) Commits a crime under chs. 939 to 948.
>
> (b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime under par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.
>
> (2) (a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum period of imprisonment is one year in the county jail.
>
> (b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum period of imprisonment is 2 years.
>
> (c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be increased by not more than $5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.
>
> (3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (1).
>
> (4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

guaranteed by the Fourteenth Amendment. We hold that the statute violates the First Amendment and is thus unconstitutional.[2]

The facts are not in dispute. On October 7, 1989, a group of young black men and boys was gathered at an apartment complex in Kenosha. Todd Mitchell, nineteen at the time, was one of the older members of the group. Some of the group were at one point discussing a scene from the movie "Mississippi Burning" where a white man beat a young black boy who was praying.

Approximately ten members of the group moved outdoors, still talking about the movie. Mitchell asked the group: "Do you all feel hyped up to move on some white people?" A short time later, Gregory Riddick, a fourteen-year-old white male, approached the apartment complex. Riddick said nothing to the group, and merely walked by on the other side of the street. Mitchell then said: "You all want to fuck somebody up? There goes a white boy; go get him." Mitchell then counted to three and pointed the group in Riddick's direction.

The group ran towards Riddick, knocked him to the ground, beat him severely, and stole his "British Knights" tennis shoes. The police found Riddick unconscious a short while later. He remained in a coma for four days in the hospital, and the record indicates he suffered extensive injuries and possibly permanent brain damage.

Mitchell was convicted of aggravated battery, party to a crime. Sections 939.05 and 940.19(1m), Stats. The jury separately found that Mitchell intentionally selected Riddick as the battery victim because of Riddick's race. The aggravated battery conviction carried a maximum sentence of two years, secs. 940.19(1m) and 939.50(3)(e), Stats. Because the jury found that Mitchell selected

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[2]Because of our holding, we do not address Mitchell's Fourteenth Amendment vagueness and equal protection claims.

Riddick because of Riddick's race, sec. 939.645(2)(c), Stats., increased the potential maximum sentence for aggravated battery to seven years. The trial court sentenced Mitchell to four years for the aggravated battery.[3]

After the circuit court denied Mitchell's request for post-conviction relief, Mitchell appealed the judgments of conviction and the sentences to the court of appeals, focusing on the constitutionality of the hate crimes statute. On June 5, 1991, the court of appeals affirmed the circuit court's judgments, concluding that Mitchell waived any equal protection challenge and that the hate crimes statute was neither vague nor overbroad. *State v. Mitchell*, 163 Wis. 2d 652, 473 N.W.2d 1 (Ct. App. 1991). We granted Mitchell's petition for review on the issue of the constitutionality of the hate crimes statute, and now reverse.[4]

This case presents an issue which has spawned a growing debate in this country: the constitutionality of legislation that seeks to address hate crimes. Numerous articles have been published concerning the issue, some applauding hate crimes statutes and some vigorously in

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[3]Mitchell was also convicted of theft, party to a crime, sec. 943.20(1)(a) and (3)(d)2, Stats. The circuit court imposed and stayed a four year sentence for the theft conviction and imposed a four year period of consecutive probation. The circuit court did not find that the theft violated the hate crimes statute. The court of appeals rejected Mitchell's challenges to the theft conviction, *Mitchell*, 163 Wis. 2d at 664-65, and that portion of the court of appeals decision is not before the court.

[4]*Amicus curiae* briefs were filed with the court on behalf of two separate coalitions: the National Association of Criminal Defense Lawyers, the Wisconsin Association of Criminal Defense Lawyers and the Wisconsin State Public Defender; and the Anti-Defamation League of B'nai B'rith, the Milwaukee Jewish Council, the Wisconsin Jewish Conference, the Milwaukee Urban League, the Madison Urban League, Inc., the NAACP--Milwaukee Branch, and the Madison Community United, Inc.

opposition.[5] Individuals and organizations traditionally allied behind the same agenda have separated on the issue of the legitimacy of hate crimes statutes. As one commentator noted:

> [T]he debate over these laws is occurring not merely between traditional allies, but between one side and itself. Moreover, whenever either viewpoint prevails, whether in the legislature, the courts, or even in a purely academic argument, its proponents do not seem to be very happy about it. They can see very well their opponents' point of view, and in fact largely agree with it. It is as if everyone involved in the debate over the permissibility and desirability of ethnic intimidation laws were actually on *both* sides at once.

Susan Gellman, 39 U.C.L.A. L. Rev. at 334 (emphasis in original).

Statistical sources indicate that incidents of all types of bias related crime are on the rise. Joseph M. Fernandez, *Bringing Hate Crime Into Focus--The Hate Crimes Statistics Act of 1990*, 26 Harv. C.R.-C.L. L. Rev. 261

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[5]*See, e.g.*, Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 U.C.L.A. L. Rev. 333 (1991); and Tanya Kateri Hernandez, *Bias Crimes: Unconscious Racism in the Prosecution of Racially Motivated Violence*, 99 Yale L.J. 845 (1990). Similarly, numerous courts and commentators are currently struggling with the constitutional implications of college campus "hate speech" rules. *See, e.g., UWM Post, Inc. v. Board of Regents*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989); Charles R. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431; Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 Duke L.J. 484; and Katherine T. Bartlett and Jean O'Barr, *The Chilly Climate on College Campuses: An Expansion of the "Hate Speech" Debate*, 1990 Duke L.J. 574.

(1991); Tanya Kateri Hernandez, *Bias Crimes: Unconscious Racism in the Prosecution of Racially Motivated Violence*, 99 Yale L.J. 845, 845-46 (1990). Between 1980 and 1986, three thousand incidents of bias related violence were documented. *Id.* at 846. The Anti-Defamation League of B'nai B'rith (ADL) reports that "[d]uring 1990 there were 1685 anti-Semitic incidents reported to the Anti-Defamation League from 40 states and the District of Columbia." 1990 Audit of Anti-Semitic Incidents, Anti-Defamation League of B'nai B'rith 1 (1990). This was the highest total ever reported in the twelve year history of the audit. *Id.* The National Gay and Lesbian Task Force reported 7031 incidents of anti-gay violence in 1989. Anti-Violence Project, National Gay and Lesbian Task Force (NGLTF), Anti-Gay Violence, Victimization and Defamation in 1989 (1990). *See also* Developments in the Law--Sexual Orientation and the Law, 102 Harv. L. Rev. 1508, 1541-42 (1989).

In response to the recent rise in hate crimes, the United States Congress enacted the Hate Crimes Statistics Act of 1990, Pub. L. No. 101-275. The purpose of the Act is to establish a national data collection system for compilation of statistics concerning bias-related crimes. The Act requires the Attorney General to publish an annual summary of the findings. *See generally*, Fernandez, *supra*.

At the state level, the response to reports of bias related crime has been significant. Nearly every state in the country has enacted some form of hate crime legislation. *See* ADL Law Report: Hate Crimes Statutes: A 1991 Status Report, Appendix C, pp. 24-26 (1991). The Wisconsin legislature's response was to enact sec. 939.645, Stats., which enhances the potential penalty for a criminal actor if the state proves that the actor intentionally selected the victim because of the victim's race, religion, color, disability, sexual orientation, national origin or ancestry.

The first step in reviewing a constitutional challenge to a statute is to determine which party bears the burden of

proving its constitutionality or unconstitutionality. While the party challenging the statute ordinarily bears the burden of proving beyond a reasonable doubt that the statute is unconstitutional, *Bachowski v. Salamone*, 139 Wis. 2d 397, 404, 407 N.W.2d 533 (1987), the burden shifts to the proponent of the statute to establish its constitutionality when the statute encroaches upon First Amendment rights. *City of Madison v. Baumann*, 162 Wis. 2d 660, 669, 470 N.W.2d 296 (1991). Because the hate crimes statute punishes the defendant's biased thought, as discussed below, and thus encroaches upon First Amendment rights, the burden is upon the state to prove its constitutionality.

The hate crimes statute violates the First Amendment directly by punishing what the legislature has deemed to be offensive thought and violates the First Amendment indirectly by chilling free speech.

The First Amendment of the United States Constitution states bluntly: "Congress shall make no law . . . abridging the freedom of speech."[6] The First Amendment protects not only speech but thought as well. "[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 234-35 (1977). Even more fundamentally, the constitution protects all speech and thought, regardless of how offensive it may be. "[I]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397,

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[6]Article I, section 3 of the Wisconsin Constitution provides in equally sweeping language that "no laws shall be passed to restrain or abridge the liberty of speech."

414 (1989).[7] As Justice Holmes put it: "If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought--not free thought for those who agree with us but freedom for the thought we hate." *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting), *overruled*, *Girouard v. United States*, 328 U.S. 61 (1946).[8]

Without doubt the hate crimes statute punishes bigoted thought. The state asserts that the statute punishes only the "conduct" of intentional selection of a victim. We disagree. Selection of a victim is an element of the underlying offense, part of the defendant's "intent" in committing the crime. In any assault upon an individual there is a selection of the victim. The statute punishes the "because of" aspect of the defendant's selection, the *reason* the defendant selected the victim, the *motive* behind the selection.

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[7]*See also R.A.V. v. City of St. Paul*, No. 90-7675, 1992 LEXIS 3863, at *9, --- U.S. --- (June 22, 1992); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65, 72 (1983); *Carey v. Brown*, 447 U.S. 455, 462-63 (1980); *FCC v. Pacifica Foundation*, 438 U.S. 726, 745-46 (1978); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63-65, 67-68 (1976) (plurality opinion); *Buckley v. Valeo*, 424 U.S. 1, 16-17 (1976); *Grayned v. Rockford*, 408 U.S. 104, 115 (1972); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970); *United States v. O'Brien*, 391 U.S. 367, 382 (1968); *Brown v. Louisiana*, 383 U.S. 131, 142-43 (1966); and *Stromberg v. California*, 283 U.S. 359, 368-69 (1931).

[8]As was said in a statement attributed to Voltaire, surely one of the philosophical ancestors of our American constitution: "I disapprove of what you say but I will defend to the death your right to say it."

Construing the model hate crimes statute designed by the Anti-Defamation League of B'nai B'rith (ADL), upon which the Wisconsin hate crimes statute is apparently loosely based,[9] one author provides the following insightful analysis:

> Under the ADL model, a charge of ethnic intimidation must always be predicated on certain offenses proscribed elsewhere in a state's criminal code. As those offenses are already punishable, all that remains is an additional penalty for the actor's *reasons* for his or her actions. The model statute does not address effects, state of mind, or a change in the character of the offense, but only the thoughts and ideas that propelled the actor to act. The government could not, of course, punish these thoughts and ideas independently. That they are held by one who commits a crime because of his or her beliefs does not remove this constitutional shield.

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[9]The ADL model statute provides:

> A. A person commits the crime of intimidation if, *by reason of* the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals, he violates Section _____ of the Penal Code (insert code provision for criminal trespass, criminal mischief, harassment, menacing, assault and/or other appropriate statutorily proscribed criminal conduct).
>
> B. Intimidation is a _____ misdemeanor/felony (the degree of the criminal liability should be at least one degree more serious than that imposed for commission of the offense).

ADL Law Report: Hate Crimes Statutes: A 1991 Status Report, p. 4 (1991) (emphasis added). While the Wisconsin statute substitutes the phrase "because of" for "by reason of," it is clear that both statutes are concerned with the actor's reason or motive for acting.

> Of course, the First Amendment protection guaranteed the actor's thoughts does not protect him or her from prosecution for the associated action. Neither, however, does the state's power to punish the action remove the constitutional barrier to punishing the thoughts.

Susan Gellman, 39 U.C.L.A. L. Rev. 333, 363 (1991).[10] Because all of the crimes under chs. 939 to 948, Stats., are already punishable, all that remains is an additional punishment for the defendant's motive in selecting the victim. The punishment of the defendant's bigoted motive by the hate crimes statute directly implicates and encroaches upon First Amendment rights.

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[10]*See also State v. Beebe*, 67 Or. App. 738, 680 P.2d 11 (1984). In *Beebe*, the Court of Appeals of Oregon interpreted an ethnic intimidation statute fashioned after the ADL model, ORS 166.155(1), and recognized that the statute punished motive:

> The statute does not offer more protection to any class of victims. Anyone may be a victim of bigotry. It is the defendant who classifies, and he does so by his *motive*. The statute distinguishes between acts of harassment which are *motivated by racial, ethnic or religious animus* and acts of harassment which are not so motivated.

Id. at 13 (emphasis added). In *People v. Grupe*, 141 Misc. 2d 6, 532 N.Y.S.2d 815 (N.Y. Crim. Ct. 1988), the court interpreted New York's hate crimes statute which prohibits persons from subjecting persons to physical contact "because of" their protected status. In that case, the court stated: "Section 240.30(3), both on its face and as applied in this case, regulates violent conduct, and physical intimidation, when committed intentionally *and because of racial, religious or ethnic prejudice*." *Id.* at 817 (emphasis added). Finally, in *Kinser v. State*, 88 Md. App. 17, 591 A.2d 894, 896 (1991), the court upheld a conviction under Maryland's hate crimes statute, Md. Ann. Code art. 27, § 470A(b)(3) (Supp. 1990), in part because the defendant's conduct "overwhelmingly demonstrate[d] his actions were *motivated by racial animus*." (Emphasis added.)

While the statute does not specifically phrase the "because of . . . race, religion, color, [etc.]" element in terms of bias or prejudice, it is clear from the history of anti-bias statutes, detailed above, that sec. 939.645, Stats., is expressly aimed at the bigoted bias of the actor. Merely because the statute refers in a literal sense to the intentional "conduct" of selecting, does not mean the court must turn a blind eye to the intent and practical effect of the law--punishment of offensive motive or thought.[11]

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[11]There seems to be considerable confusion regarding the meaning and effect of "motive" in criminal law. As Black's Law Dictionary 810 (6th ed. 1990) states in its definition of "intent":

> Intent and motive should not be confused. Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted.

This confusion is manifested clearly in the dissenting opinion of Justice Bablitch, which correctly defines "intentionally" at p. ___ as "a purpose to do the thing or cause the result specified," correctly recognizes at pp. ___ n. 2 that the term "because of" implicates an actor's motive, and somehow concludes that the hate crimes statute involves ordinary criminal intent.

In this case the crime was aggravated battery, and the necessary intent under sec. 940.19(1m), Stats., is an "intent to cause great bodily harm." Quite clearly, Mitchell's intent to cause great bodily harm to Riddick is distinct from his motive or reason for doing so. Criminal law is not concerned with a person's reasons for committing crimes, but rather with the actor's intent or purpose in doing so.

As explained by Professor Gellman:

> "Motive," "intent," and "purpose" are related concepts in that they all refer to thought processes. They are legally distinct in crucial respects, however. Motive is nothing more than an actor's reason for acting, the "why" as opposed to the "what" of conduct. Unlike purpose or

The conduct of "selecting" is not akin to the conduct of assaulting, burglarizing, murdering and other criminal conduct. It cannot be objectively established. Rather, an examination of the intentional "selection" of a victim necessarily requires a subjective examination of the actor's motive or reason for singling out the particular person against whom he or she commits a crime.[12]

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intent, motive cannot be a criminal offense or an element of an offense.

. . . .

The distinction becomes more clear upon consideration of the effect of altering the intent or purpose on the legal characterization of the same conduct, as compared to the effect (or lack thereof) of altering the motive. Continuing with the example of burglary, changing the *purpose* of the break-in changes the very nature of the act: if *A* broke into *B*'s house for the purpose of getting *A*'s own property (not a criminal purpose), the act of breaking in is simply breaking and entering or trespass, not burglary, even if *A*'s motive was identical (the desire to pay his debts). By contrast, changing *A*'s *motives*, even to more sympathetic ones (say, the desire to buy a house for the homeless), while his *purpose* was that of committing the crime of theft in *B*'s house, does *not* change the nature of the act: it is still burglary.

Susan Gellman, 39 U.C.L.A. L. Rev. at 364–65 (emphasis in original). While the state speaks of the "intentional" aspect of the hate crimes statute, when the focus is on the "selects . . . because of" aspect of the law, it becomes clear that it is the actor's motive which is targeted and punished by the statute.

[12]In fact, on May 13, 1992, the legislature amended sec. 939.645, Stats., to apply specifically where the selection is "in whole or in part because of the actor's belief or perception regarding" the victim's status "whether or not the actor's belief or perception was correct." 1991 Wis. Act 291. Sections 939.645(1)(b) and (4), Stats., currently provide (with the substantive changes highlighted):

In this case, Todd Mitchell selected Gregory Reddick because Reddick is white. Mitchell is black. The circumstantial evidence relied upon to prove that Mitchell selected Reddick "because" Reddick is white included Mitchell's speech--"Do you all feel hyped up to move on some white people?"--and his recent discussion with other black youths of a racially charged scene from the movie "Mississippi Burning." This evidence was used not merely to show the intentional selection of the victim, but was used to prove Mitchell's bigoted bias. The physical assault of Reddick is the same whether he was attacked because of his skin color or because he was wearing "British Knight" tennis shoes. Mitchell's bigoted motivation for selecting Reddick, his thought which impelled him to act, is the

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(1)(b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property that is damaged or otherwise affected by the crime under par. (a) *in whole or in part* because of *the actor's belief or perception regarding* the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, *whether or not the actor's belief or perception was correct*.

(4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry *or proof of any person's perception or belief regarding another's race, religion, color, disability, sexual orientation, national origin or ancestry* is required for a conviction for that crime.

Thus the legislature has removed any doubt that the aim of the statute is the actor's subjective motivation. The dissenting opinions ignore this legislative clarification in their refusal to recognize that the statute is focused upon and punishes the defendant's motive.

reason that his punishment was enhanced. In Mitchell's case, that motivation was apparently a hatred of whites.[13]

The statute commendably is designed to punish--and thereby deter--racism and other objectionable biases, but deplorably unconstitutionally infringes upon free speech. The state would justify its transgression against the constitutional right of freedom of speech and thought because its motive is a good one, but the magnitude of the proposed incursion against the constitutional rights of all of us should no more be diminished for that good motive than should a crime be enhanced by a separate penalty because of a criminal's bad motive.[14]

The state admits that this case involves legislation that seeks to address bias related crime. The only definition of "bias" relevant to this case is "prejudice." A statute specifically designed to punish personal prejudice impermissibly infringes upon an individual's First Amendment rights, no matter how carefully or cleverly one words the statute. The hate crimes statute enhances the punishment of bigoted criminals because they are bigoted. The statute is directed solely at the subjective motivation of the actor--his or her prejudice. Punishment of one's

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[13]While the statute as written may extend to situations where the actor in fact is not biased, this does not save the statute. The legislature may not subvert a constitutional freedom--even one as opprobrious as the right to be a bigot--by carefully wording a statute to affect more than simply that freedom.

[14]As has long been recognized, the road to hell is paved with good intentions. See George Herbert, *Jacula Prudentum* (1640); Samuel Johnson, from James Boswell, *Life of Dr. Johnson* (1791); George Bernard Shaw, *Maxims for Revolutionists*; and others. Or as the latin poet Virgil said in the *Aeneid* in a reference to the slippery slope, "Facilis descensus Averno," which liberally translated means "Beware that first false step." Eugene Ehrlich, *Nil Desperandum* 107 (Guild Publishing 1987).

thought, however repugnant the thought, is unconstitutional.[15]

In *R.A.V.*, *supra*, decided June 22, 1992, the United States Supreme Court held that a Minnesota ordinance prohibiting bias-motivated disorderly conduct[16] was facially invalid under the First Amendment. Accepting the Minnesota Supreme Court's determination that the ordinance reached only expressions that constituted "fighting words" within the meaning of *Chaplinsky*, the Court held that the government may not constitutionally regulate even otherwise unprotected speech on the basis of hostility towards the idea expressed by the speaker. *R.A.V.*, 1992 U.S. LEXIS 3863, at *24-28. In other words,

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[15]Of course, freedom of speech is not absolute. For example, the government may regulate or punish "fighting words" that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942). Also, the government may regulate expressive conduct where there is an important governmental interest and the regulation is narrowly tailored to address that interest. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). The bigoted thought which is punished by the hate crimes statute fits neither category. While an individual's bigoted speech may occasionally provoke retaliation, a person's thought will not. Nor is it argued that a hate crime is protected expressive conduct. It is not. Rather, a person's bigoted thought, the very thing punished by the hate crimes statute, is entitled to the full protection of the First Amendment.

[16]The ordinance, St. Paul, Minn. Legis. Code § 292.02 (1990), provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

while the government may regulate all fighting words, it may not regulate only those fighting words with which it disagrees. Such a prohibition is nothing more than a governmental attempt to silence speech on the basis of its content. *Id.* at *26.

While the St. Paul ordinance invalidated in *R.A.V.* is clearly distinguishable from the hate crimes statute in that it regulates fighting words rather than merely the actor's biased motive, the Court's analysis lends support to our conclusion that the Wisconsin legislature cannot criminalize bigoted thought with which it disagrees. The Court stated:

> [T]he only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express that hostility--but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree.

Id. at *32-33 (footnote omitted). The ideological content of the thought targeted by the hate crimes statute is identical to that targeted by the St. Paul ordinance--racial or other discriminatory animus. And, like the United States Supreme Court, we conclude that the legislature may not single out and punish that ideological content.

Thus, the hate crimes statute is facially invalid because it directly punishes a defendant's constitutionally protected thought.[17]

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[17]The dissent of Justice Bablitch asserts that punishing motive is permissible, based upon *Dawson v. Delaware*, 90-6704 (U.S. Supreme Court, March 9, 1992), wherein the United States Supreme Court indicated that evidence of a convicted murderer's bigoted motivation in committing the murder is a relevant inquiry in sentencing. Dissenting Op. at ____. The dissent is

The hate crimes statute is also unconstitutionally overbroad. A statute is overbroad when it intrudes upon a substantial amount of constitutionally protected activity. Aside from punishing thought, the hate crimes statute also threatens to directly punish an individual's speech and assuredly will have a chilling effect upon free speech. As we explained in *Bachowski*:

> A [statute] is overbroad when its language, given its normal meaning, is so sweeping that its sanctions may be applied to constitutionally protected conduct which the state is not permitted to regulate. The essential vice of an overbroad law is that by sweeping protected activity within its reach it deters citizens from exercising their protected constitutional freedoms, the so-called "chilling effect."

Bachowski, 139 Wis. 2d at 411 (citations omitted). The chilling effect need not be evident in the defendant's case; it is enough if hypothetical situations show that it will chill the rights of others. *Milwaukee v. Wilson*, 96 Wis. 2d 11, 19-20, 291 N.W.2d 452 (1980). Finally, "[i]n the First Amendment context, 'criminal statutes must be scrutinized with particular care . . ..'" *R.A.V.*, 1992 U.S. LEXIS 3863, at *63, (White, J., concurring), *citing Houston v. Hill*, 482 U.S. 451, 459 (1987).[18]

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wrong. Of course it is permissible to consider evil motive or moral turpitude when sentencing for a particular crime, but it is quite a different matter to sentence for that underlying crime and then add to that criminal sentence a separate enhancer that is directed solely to punish the evil motive for the crime.

[18]In *R.A.V.*, four Justices disagreed with the analysis of the majority, but concurred in the judgment because they concluded that the Minnesota ordinance is fatally overbroad because it "makes criminal expressive conduct that causes only hurt feelings, offense, or resentment, and is protected by the First Amendment." *R.A.V.*, 1992 U.S. LEXIS 3863, at *58-64 (White, J., concurring).

The state admits as it must that speech may often be used as circumstantial evidence to prove the actor's intentional selection. This case is a perfect example. Mitchell's speech is the primary evidence of his intentional selection of Riddick. The use of the defendant's speech, both current and past, as circumstantial evidence to prove the intentional selection, makes it apparent that the statute sweeps protected speech within its ambit and will chill free speech.

The criminal conduct involved in any crime giving rise to the hate crimes penalty enhancer is already punishable. Yet there are numerous instances where this statute can be applied to convert a misdemeanor to a felony merely because of the spoken word. For example, if A strikes B in the face he commits a criminal battery. However, should A add a word such as "nigger," "honkey," "jew," "mick," "kraut," "spic," or "queer," the crime becomes a felony, and A will be punished not for his conduct alone--a misdemeanor--but for using the spoken word. Obviously, the state would respond that the speech is merely an indication that A intentionally selected B because of his particular race or ethnicity, but the fact remains that the necessity to use speech to prove this intentional selection threatens to chill free speech. Opprobrious though the speech may be, an individual must be allowed to utter it without fear of punishment by the state.

And of course the chilling effect goes further than merely deterring an individual from uttering a racial epithet during a battery. Because the circumstantial evidence required to prove the intentional selection is limited only by the relevancy rules of the evidence code, the hate crimes statute will chill every kind of speech. As Professor Gellman explains:

> In addition to any words that a person may speak during, just prior to, or in association with the commission of one of the underlying offenses, all of his or her remarks upon earlier occasions, any books

> ever read, speakers ever listened to, or associations ever held could be introduced as evidence that he or she held racist views and was acting upon them at the time of the offense. Anyone charged with one of the underlying offenses could be charged with [intentional selection] as well, and face the possibility of public scrutiny of a lifetime of everything from ethnic jokes to serious intellectual inquiry. Awareness of this possibility could lead to habitual self-censorship of expression of one's ideas, and reluctance to read or listen publicly to the ideas of others, whenever one fears that those ideas might run contrary to popular sentiment on the subject of ethnic relations.
>
> . . .
>
> It is no answer that one need only refrain from committing one of the underlying offenses to avoid the thought punishment. Chill of expression and inquiry by definition occurs *before* any offense is committed, and even if no offense is *ever* committed. The chilling effect thus extends to the entire populace, not just to those who will eventually commit one of the underlying offenses.

Susan Gellman, 39 U.C.L.A. L. Rev. at 360-61 (emphasis in original) (citations omitted).[19]

Thus, the hate crimes statute is unconstitutionally overbroad because it sweeps protected First Amendment speech within its reach and thereby chills free speech.

Finally, we consider the argument advanced by the *amici curiae* ADL, et al., and embraced by the dissent that an analogy exists between the hate crimes statute and

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[19] *See, e.g, Grimm v. Churchill*, 932 F.2d 674, 675-76 (7th Cir. 1991) (fact that arresting officer in ethnic intimidation case "had heard through his brother-in-law that Grimm had a history of making racial insults and engaging in racial confrontations" supported conclusion that officer had probable cause to arrest).

antidiscrimination laws, and that the numerous United States Supreme Court decisions upholding antidiscrimination laws lend support to the hate crimes statute.[20] We disagree.

Discrimination and bigotry are not the same thing. Under antidiscrimination statutes, it is the discriminatory act which is prohibited. Under the hate crimes statute, the "selection" which is punished is not an act, it is a mental process. In this case, the act was the battery of Riddick; what was punished by the hate crimes statute was Mitchell's reason for selecting Riddick, his discriminatory motive.

As explained above, selection under the hate crimes statute is solely concerned with the subjective motivation of the actor. Prohibited acts of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, and analogous state antidiscrimination statutes, such as refusal to hire, termination, etc., involve objective acts of discrimination. What is punished by the hate crimes penalty enhancer is a subjective mental process, not an objective act. The actor's penalty is enhanced not because the actor fired the victim, terminated the victim's employment, harassed the victim, abused the victim or otherwise objectively mistreated the victim because of the victim's protected status; the penalty is enhanced because the actor subjectively selected the victim because of the victim's protected status. Selection, quite simply, is a mental process, not an objective act.[21]

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[20]*See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Hishon v. King & Spalding*, 467 U.S. 69 (1984); and *Runyan v. McCrary*, 427 U.S. 160 (1976).

[21]The dissenting opinion of Justice Bablitch recites that it does not understand this "very complicated and elaborate distinction" between the hate crimes penalty enhancer and antidiscrimination statutes. That is interesting in light of the dissent's recognition at ____ that the statute applies to the

Finally, there is a difference between the civil penalties imposed under Title VII and other antidiscrimination statutes and the criminal penalties imposed by the hate crimes law, and contrary to the dissent's protestations, it is a difference that matters.[22] The difference is that while the First Amendment may countenance slight incursions into free speech where the overarching concern is protection from objective acts of bigotry in the employment marketplace and the adverse consequences of such acts on the civil rights of minorities, the First Amendment will not allow the outright criminalization of subjective bigoted thought. We have little doubt that an antidiscrimination statute which criminalized an employer's subjective discrimination, with nothing more, would be unconstitutional. This apparent schism in the First Amendment's protective shield is perhaps best understood in the context of overbreadth. A statute criminalizing the bigoted selection of a victim will chill free speech to a much greater extent than a statute imposing civil penalties for objective discriminatory acts.

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defendant's "selection decision," an obviously subjective mental process. To state that a "decision" is analogous to the conduct proscribed by antidiscrimination statutes is untenable. We freely admit that antidiscrimination statutes are concerned with the actor's motive, but it is the objective conduct taken in respect to the victim which is redressed (not punished) by those statutes, not the actor's motive.

We repeat. The hate crimes statute does not punish the underlying criminal act, it punishes the defendant's motive for acting. Taking the dissent's explanation that the statute is concerned with the "decision" of the defendant, it is clear that the hate crimes statute creates nothing more than a thought crime. Apparently that dissent is comfortable with such an Orwellian notion; we are not.

[22]*See* Bablitch, J., dissenting, at ____ n. 2, ____ n. 3, ____ and ____.

In the wake of the Los Angeles riots sparked by the acquittal of four white police officers accused of illegally beating black motorist Rodney King, it is increasingly evident that racial antagonism and violence are as prevalent now as they ever have been. Indeed, added to the statistical compilation of bias related crimes could be the vicious beating of white truck driver Reginald Denny by black rioters, horrifyingly captured on film by a news helicopter. As disgraceful and deplorable as these and other hate crimes are, the personal prejudices of the attackers are protected by the First Amendment. The constitution may not embrace or encourage bigoted and hateful thoughts, but it surely protects them.

Because we wholeheartedly agree with the motivation of the legislature in its desire to suppress hate crimes, it is with great regret that we hold the hate crimes statute unconstitutional--and only because we believe that the greater evil is the suppression of freedom of speech for all of us.

By the Court.--The decision of the court of appeals is reversed and the cause remanded to the circuit court for resentencing on the aggravated battery conviction.

SHIRLEY S. ABRAHAMSON, J. (*dissenting*). Today, this court concludes that sec. 939.645, Stats. 1989-90, is unconstitutional, holding that it violates the First Amendment right to freedom of speech.[1]

The Constitution teaches mistrust of any government regulation of speech or expression. Had I been in the legislature, I do not believe I would have supported this statute. I do not think this statute will accomplish its goal; I would direct the state's efforts to protect people from invidious discrimination and intimidation in other directions. As a judge, however, after much vacillation, I

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[1]1991 Wis. Act 291 is not before us.

conclude that this law should be construed narrowly and should be held constitutional.

This case presents a very difficult question involving the convergence of three competing societal values--freedom of speech, equal rights, and protection against crime.

Freedom of speech is the most treasured right in a free, democratic society. Our constitution protects our right to think, speak and write as we wish. This freedom of expression encompasses all speech, pleasant or unpleasant, popular or unpopular. Even expressions of bigotry are protected. Our constitutional history makes clear that expression hostile to the values of our country should be addressed with more speech, not suppressed with police power.

Nevertheless, our law recognizes the harmful effects of invidious classification and discrimination. We acknowledge that when individuals are victimized because of their status, such as race or religion, the resulting harm is greater than the harm that would have been caused by the injurious conduct alone. In addition to the injury inflicted, the victim may suffer feelings of fear, shame, isolation and inability to enjoy the rights and opportunities that should be available to all persons. Furthermore, all members of the group to which the victim belongs may suffer when the individual is victimized. The state has determined that harms inflicted because of race, color, creed, religion or sexual orientation are more pressing public concerns than other harms. The state has legitimate, reasonable and neutral justifications for selective protection of certain people.[2] "In light of our Nation's long and painful experience with discrimination, this determination is plainly reasonable. Indeed . . . it is

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[2]*R.A.V. v. City of St. Paul*, 1992 U.S. LEXIS 3863, ___ U.S. ___ (June 22, 1992) (*67, *81-*82, Stevens, J., concurring).

compelling."[3] The state has a compelling interest in combating invidiously discriminatory conduct, even when the conduct is linked to viewpoints otherwise protected by the First Amendment.

In addition, our government has a compelling interest in preserving the peace, in protecting each person from crime and from the fear of crime.

Section 939.645 addresses only those crimes committed "because of" the victim's "race, religion, color, disability, sexual orientation, national origin or ancestry." It does not punish all crimes committed by persons who have expressed bigoted beliefs. An individual may commit a criminal act. That same individual may possess or express bigoted beliefs. These two facts standing alone, however, do not subject that individual to punishment under sec. 939.645.

In my mind, it is the tight nexus between the selection of the victim and the underlying crime that saves this statute. The state must prove beyond a reasonable doubt both that the defendant committed the underlying crime and that the defendant intentionally selected the victim because of characteristics protected under the statute. To prove intentional selection of the victim, the state cannot use evidence that the defendant has bigoted beliefs or has made bigoted statements unrelated to the particular crime. Evidence of a person's traits or beliefs would not be permissible for the purpose of proving the person acted in conformity therewith on a particular occasion. The statute requires the state to show evidence of bigotry relating directly to the defendant's intentional selection of this particular victim upon whom to commit the charged crime. The state must directly link the defendant's bigotry to the invidiously discriminatory selection of the victim and to the commission of the underlying crime.

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[3] *R.A.V. v. City of St. Paul*, 1992 U.S. LEXIS 3863, ___ U.S. ___ (June 22, 1992) (*51, White, J., concurring).

Interpreted in this way, I believe the Wisconsin statute ties discriminatory selection of a victim to conduct already punishable by state law in a manner sufficient to prevent erosion of First Amendment protection of bigoted speech and ideas.

Read narrowly as the legislature intended, this statute is a prohibition on conduct, not on belief or expression. The statute does nothing more than assign consequences to invidiously discriminatory acts.

The state's interest in punishing bias-related criminal conduct relates only to the protection of equal rights and the prevention of crime, not to the suppression of free expression. The enhanced punishment justly reflects the crime's enhanced negative consequences on society. Thus interpreted the statute prohibits intentional conduct, not belief or expression. The only chilling effect is on lawless conduct.

Bigots are free to think and express themselves as they wish, except that they may not engage in criminal conduct in furtherance of their beliefs. Section 939.645 does not punish abstract beliefs or speech. The defendant's beliefs or speech are only relevant as they relate directly to the commission of a crime.

The United States Supreme Court's recent decision in *R.A.V. v. City of St. Paul*, 1992 U.S. LEXIS 3863, ___ U.S. ___ (June 22, 1992), has not persuaded me to the contrary. In *R.A.V.*, the Supreme Court held unconstitutional a St. Paul ordinance prohibiting placing "on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reason to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender . . .." The majority opinion in *R.A.V.* ruled the ordinance facially unconstitutional because, even assuming that the ordinance only regulated "fighting words," the ordinance

was based on the content of the ideas expressed by a defendant. The four concurring justices found the ordinance unconstitutional on the ground that the statute was an overbroad prohibition of fighting words.

R.A.V. does not control this case. Section 939.645 is not similar to the St. Paul ordinance; its validity does not rely on the "fighting words" doctrine. The defendant in *R.A.V.* was also charged under a state statute, sec. 609.2231(4), Minn. Stats. 1990, much more similar to sec. 939.645 than the St. Paul ordinance, but the defendant did not challenge that charge.

For the reasons set forth, I dissent.

WILLIAM A. BABLITCH, J. (*dissenting*).

> everywhere the crosses are burning, sharp-shooting goose-steppers around every corner, there are snipers in the schools . . . (I know you don't believe this. You think this is nothing but faddish exaggeration. But they are not shooting at you.)
>
> Lorna Dee Cervantes[1]

The law in question is not a "hate speech" law.

Nor is it really a "hate crimes" law as it has been somewhat inappropriately named.

It is a law against discrimination--discrimination in the selection of a crime victim.

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[1]Cervantes, Poem for the Young White Man Who Asked Me How I, An Intelligent Well Read Person Could Believe in the War Between Races, in M. Sanchez, Contemporary Chicana Poetry 90 (1986).

Today the majority decides that the same Constitution which does not protect discrimination in the marketplace does protect discrimination that takes place during the commission of a crime. Numerous federal and state laws exist which prohibit discrimination in the selection of who is to be hired, or fired, or promoted. No one seriously (at least until today) questions their constitutionality. Yet the majority today gives constitutional protection to discrimination in the selection of who is to be the victim of a crime. Both sets of laws involve discrimination, both involve victims, both involve action "because of" the victim's status.

The majority says there is a difference in the two types of laws. They are wrong. There is no support in law or logic for their position. How can the Constitution not protect discrimination in the selection of a victim for discriminatory hiring, firing, or promotional practices, and at the same time protect discrimination in the selection of a victim for criminal activity? How can the Constitution protect discrimination in the performance of an illegal act and not protect discrimination in the performance of an otherwise legal act? How can the Constitution not protect discrimination in the marketplace when the action is taken "because of" the victim's status, and at the same time protect discrimination in a street or back alley when the criminal action is taken "because of" the victim's status?

These are laws against discrimination, pure and simple. Dictionaries do not disagree on the meaning of the term discrimination: to distinguish, to differentiate, to act on the basis of prejudice. Laws forbidding discrimination in the marketplace and laws forbidding discrimination in criminal activity have a common denominator: they are triggered when a person acts "because of" the victim's protected status. These exact words appear in most, if not all antidiscrimination laws. These exact words appear in the laws before us today.

Yet the majority says one is constitutional, one is not. I submit it is pure sophistry to distinguish the two. In its effort to protect speech, the majority's constitutional pen gets too close to the trees and fails to see the forest.

The majority rationalizes their conclusion by insisting that this statute punishes bigoted thought. Not so. The statute does not impede or punish the right of persons to have bigoted thoughts or to express themselves in a bigoted fashion or otherwise, regarding the race, religion, or other status of a person. It does attempt to limit the effects of bigotry. What the statute does punish is acting upon those thoughts. It punishes the act of discriminatory selection plus criminal conduct, not the thought or expression of bigotry. The Constitution allows a person to have bigoted thoughts and to express them, but it does not allow a person to act on them. The majority says otherwise. I disagree.

I conclude the statute in question is neither vague nor overbroad, nor does it offend equal protection. Accordingly, I dissent.

I.

Examples of shocking bias related crimes making headlines recently include:

> [A] white man assaults a black woman, rips off her clothes, douses her with lighter fluid and, yelling 'nigger', threatens to set her on fire.
>
> According to police in a Washington suburb, the attack capped a night in which two young white men planned to hunt down blacks in revenge for being called 'honkies', a derogatory term blacks use for whites.
>
> They pounced on two black women walking towards a shopping centre early in the morning. One

> escaped and ran for help, the other was beaten, stripped nearly naked, and sprayed with lighter fluid. Bernd Debusmann, *Hate Crime Shocks Washington, Shows Race Problems*, Reuters, March 4, 1992.
>
> In Kentucky this September, assailants beat a young gay man with a tire iron, locked him into a car trunk with a bunch of snapping turtles and then tried to set the car on fire. He was left with severe brain damage. Neal R. Peirce, *Recurring Nightmare of Hate Crimes*, National Journal, December 15, 1990, at Section State of the States; Vol. 22 No. 50 p. 3045.
>
> Amber Jefferson, a 15 year-old high school cheerleader in Orange County, Calif., almost lost her life because of the fact that she has one white and one black parent. Four attackers, allegedly all white, beat her with a baseball bat and split her face open with a shard of plate glass. Surgery to fix the wounds took 10 hours. It will be two years before she regains muscle control in her face. *Id.*
>
> The 120 boys at Valley Torah High typically spend half their school day in college prep classes and half in religious instruction.
>
> But for the past week--since their school was painted with swastikas, Ku Klux Klan symbols and Jewish slurs--they have been getting an education in hate. Sally Ann Stewart, *Hate Crimes: 'Litany of shame'* // Incidents on rise in California, USA Today, March 13, 1992, at 3A.

Wisconsin has also not been immune from reprehensible incidents of bias related crime:

> Anti-Semitic attacks erupt regularly, even at such supposedly progressive, enlightened institutions as

> the University of Wisconsin (Madison), where a Jewish student center has been pelted with rocks and bottles and where Jewish fraternities and sororities have been vandalized. Counselors at a Madison Jewish day camp discovered that the brake linings had been cut on a bus used to transport children--fortunately before the bus was used. A Madison synagogue, after repeated anti-Semitic incidents, was kept under armed guard for a time. *Recurring Nightmare of Hate Crimes*, National Journal, December 15, 1990, at Section State of the States; Vol. 22 No. 50 p. 3045.

In 1987, the Wisconsin legislature acted to alleviate bias related crime. The Wisconsin legislature's response was to enact sec. 939.645, Stats., which enhances the penalty a perpetrator receives if the State of Wisconsin (State) proves that the perpetrator intentionally selected the victim because of the victim's race, religion, color, or other protected status.

I first address Mitchell's and the majority's overbreadth argument. A statute is overbroad when its language, given its normal meaning, is so sweeping that its sanctions may be applied to conduct which the state is not permitted to regulate. *Bachowski v. Salamone*, 139 Wis. 2d 397, 411, 407 N.W.2d 533 (1987). "The essential vice of an overbroad law is that by sweeping protected activity within its reach it deters citizens from exercising their protected constitutional freedoms, the so-called 'chilling effect.'" *Id.* An overbreadth challenge may be based on hypothetical speculation and does not require the presence of a "chilling effect" in the defendant's particular case. *Milwaukee v. Wilson*, 96 Wis. 2d 11, 19-20, 291 N.W.2d 452 (1980). This court has also held that where possible we must interpret a statute to avoid constitutional invalidity. *Bachowski*, 139 Wis. 2d at 405.

I conclude that the First Amendment is not implicated in this case. However, in concluding that the challenged

statute is constitutional I do not take lightly the First Amendment issue that Mitchell has raised. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

I reject the majority's and Mitchell's argument that sec. 939.645, Stats., punishes or has a chilling effect on free speech. The penalty enhancement statute is directed at the action or conduct of selecting a victim and committing a crime against that victim because of his or her protected status. The gravamen of the offense is selection, not the perpetrator's speech, thought, or even motive.[2] The

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[2]One of the majority's chief contentions seems to be that the statute is unconstitutional because it punishes motive. Although I do not think that this statute punishes motive, even if it did, I have serious doubts about the majority's conclusion that punishing motive is impermissible under the First Amendment. The majority cites no authority to support its conclusion that punishing motive is impermissible under the First Amendment. In fact, the majority fails to explain why, under its analysis, it is impermissible for the penalty enhancer statute to punish a discriminatory motive, yet permissible for antidiscrimination statutes to punish a discriminatory motive. *See, e.g., Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419, 424-425 (1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert denied*, 481 U.S. 1041 (1987) ("it is merely concluded that the company's pre-discharge conduct toward plaintiff was not based on anti-female animus. Absent such animus, there can be no violation of Title VII"); *E.E.O.C. v. Maxwell Co.*, 726 F.2d 282 (1984). In fact one writer commenting on Title VII is at complete odds with the majority's analysis of motive under the criminal law. He writes:

> Title VII was passed because Congress perceived that actions resulting from bad thoughts were sufficiently pervasive to substantially limit economic opportunities of blacks. 'Bad thoughts' is, of course, shorthand for a wide range of interior activities which are the necessary

statute does not impede or punish the right of persons to have thoughts or to express themselves regarding the race, religion, or other status of a person. The statute's concern is with criminal conduct plus purposeful selection. By enhancing the penalty, the penalty enhancer statute punishes more severely criminals who act with what the legislature has determined is a more depraved, antisocial intent: an intent not just to injure but to intentionally pick out and injure a person because of a person's protected status. The legislative concern expressed in this statute is not with the beliefs, motives, or speech of a perpetrator but with his or her action of purposeful selection plus criminal conduct.

Admittedly, the conduct prohibited by the penalty enhancer statute can be proven by an extensive combination of facts that might include words uttered by

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predicate for disparate treatment liability. A more common terminology is 'prohibited considerations,' but 'bad thoughts' describes more graphically what disparate treatment entails.

. . ..

The notion of bad thoughts is not peculiar to disparate treatment discrimination under Title VII. It has played an important role in the Court's constitutional decisions over the last two decades in contexts ranging from equal protection to freedom of speech and religion. Nor is such concern new in the law. Modern criminal law has always manifested a concern for motivations under the rubric of mens rea. In the discrimination context, however, motivations are both more important and more elusive than in criminal law because the 'conduct' violating Title VII is neutral or positive except when it springs from bad thoughts. In the criminal context, much prohibited conduct is itself suspect. Charles A. Sullivan, Accounting for *Price Waterhouse*: Proving Disparate Treatment Under Title VII, Brooklyn L. Rev. 1107, 1139–1140 (1991).

a defendant.[3] However, if words are used to prove the crime, the words uttered are not the subject of the statutory prohibition; rather, they are used only as circumstantial evidence to prove the intentional selection. Permitting the use of such evidence does not chill free speech. Just as words of defendants are frequently used to prove the element of intent in many crimes without violating the First Amendment, words may be used to prove the act of intentional selection. It is no more a chilling of free speech to allow words to prove the act of intentional selection in this "intentional selection" statute than it is to allow a defendant's words that he "hated John Smith and wished he were dead" to prove a defendant intentionally murdered John Smith.

The use of speech under the penalty enhancer is not different than its use in prosecutions under antidiscrimination laws or fair housing discrimination laws. Antidiscrimination statutes often employ terms

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[3]The majority essentially contends that the use of speech as circumstantial evidence impermissibly chills free speech. Once again the majority fails to explain why this is not also true in antidiscrimination cases. For example, under Title VII sexual harassment jurisprudence, an employee's or employer's sexist speech is not merely evidence of prohibited conduct; it is the prohibited conduct. *See, e.g., Zabkowicz v. West Bend Co.*, 589 F. Supp. 780, 782–83 (E.D. Wis. 1984) (in three-year period, 75 sexually explicit drawings posted on pillars and other conspicuous places in the workplace); *Volk v. Coler*, 845 F.2d 1422, 1426–27 (7th Cir. 1988) (plaintiff alleged, among other things, that her supervisor called her and other female employees 'hon,' 'honey,' 'babe' and 'tiger.') *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990) (pervasive use of derogatory and insulting terms relating to women generally and addressed to female employees personally may be sufficient to show a hostile work environment). *See also Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991) ("pictures and verbal harassment are not protected speech because they act as discriminatory conduct in the form of a hostile work environment").

similar to those contained in the penalty enhancer. For instance, secs. 118.13, 111.321, 101.225, and 66.395, Stats., all prohibit certain conduct that occurs either "because of" or "on account of" or "on the basis of" a status of another person. Proof of violations of these statutes will often involve proof of words used by the violators. Under these statutes and the penalty enhancer, a particular action or conduct is being punished, and speech may be used to prove the conduct. Under the penalty enhancer statute, speech is simply probative of the element of intentional selection. The use of such evidence does not violate the First Amendment. The action of intentional selection is punished, and the words used by a defendant are merely evidence of an intentional selection.

Although the majority attempts to distinguish this statute and antidiscrimination statutes, its distinction is a distinction without a difference. The majority at ____ states that the penalty enhancer statute is unconstitutional because the statute does not punish only the conduct of intentional selection of a victim "[t]he statute punishes the 'because of' aspect of the defendant's selection, the *reason* the defendant selected the victim . . .." On page ____, the majority abandons this reasoning when applied to antidiscrimination laws. The majority posits that the distinction between the penalty enhancer statute and antidiscrimination laws is that antidiscrimination laws punish only the discrimination, i.e., the refusal to hire, not the discriminatory motive. The majority forgets a key requirement of antidiscrimination statutes. Antidiscrimination statutes do not prohibit a person from not hiring someone of a protected class, they prohibit a person from not hiring someone of a protected class *because* or *on the basis of* his or her protected class. It is not, as the majority suggests, the failure to hire that is being punished, it is the failure to hire because of status. How can the majority find the penalty enhancer statute unconstitutional because it punishes the "because of" aspect of a selection process, and at the same time conclude that antidiscrimination statutes, which do the

same thing, are constitutional? The majority at the least ought to answer this question.

The majority also attempts to explain its very complicated and elaborate distinction between this statute and antidiscrimination laws based on some sort of difference between subjective motivations and objective acts. Although I do not quite understand the majority's use of the terms objective and subjective in the context of this case, I interpret the majority's argument to be that this statute is unconstitutional because it punishes the subjective motivations of the actor, while discrimination statutes involve objective acts of discrimination. This is merely the same distinction without a difference referred to above. Like antidiscrimination statutes, the penalty enhancer statute involves an "objective act"--the criminal conduct, e.g., the battery, etc. Likewise, despite the majority's contentions to the contrary, under the majority's analysis antidiscrimination statutes, because they require that the act be "because of" the protected status of the victim, implicate and punish the subjective motive of the actor. For example, in disparate treatment cases (cases in which the discrimination alleged is overt discrimination as opposed to disparate impact where the practices are fair in form, but discriminatory in operation) a person simply does not violate Title VII for refusing to hire a person of a protected status. The objective act alone does not invoke the provisions of the statute. Rather, the refusal must be "because of" the victim's protected status. Assuming that the majority is correct that this statute punishes motive, it fails to explain how the enhancer is any different from antidiscrimination laws.

If one assumes that the majority is correct that the penalty enhancer punishes motive there is only one distinction between it and antidiscrimination laws. The only distinction that exists between the penalty enhancer statute and antidiscrimination statutes is that the objective acts that are punished are different in that antidiscrimination laws punish legal conduct plus bad

motive and the enhancer punishes criminal conduct plus bad motive. While it is true that this is a distinction, the majority never explains why it is a distinction that matters. Why is it permissible to punish motive when it is accompanied by legal conduct and impermissible to punish motive when it is accompanied by illegal conduct. The majority does not give an answer to this question, it merely concludes that the distinction somehow makes a difference. Saying so, again and again, does not make it so.

Lastly, even assuming that the majority is correct in saying that this statute punishes motive, it has still failed to explain why punishing motive is impermissible. A recent case from the U.S. Supreme Court would seem to indicate that the majority is in error. In *Dawson v. Delaware*, 90-6704, slip. op. at 5 (U.S. Supreme Court March 9, 1992), the United States Supreme Court held that "the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." Although under the facts of *Dawson* the Court concluded that there was a First Amendment violation, its analysis lends considerable support to the conclusion that considering the perpetrator's motivations in determining the appropriate sentence is permissible. For example, in concluding that evidence that the defendant belonged to the Aryan Brotherhood was impermissibly submitted during the penalty phase of a capital case in violation of the First Amendment, the court stated:

> Even if the Delaware group to which Dawson allegedly belongs is racist, those beliefs, so far as we can determine, had no relevance to the sentencing proceeding in this case. For example, the Aryan Brotherhood evidence was not tied in any way to the murder of Dawson's victim. In *Barclay*, on the contrary, the evidence showed that the defendant's membership in the Black Liberation Army, and his consequent desire to start a 'racial war,' were related

> to the murder of a white hitchhiker. *See* 463 U.S., at 942-944 (plurality opinion). We concluded that it was most proper for the sentencing judge to 'tak[e] into account the *elements of racial hatred in this murder*.' *Id.*, at 949. In the present case, however, the murder victim was white, as is Dawson; elements of racial hatred were therefore not involved in the killing. *Dawson v. Delaware*, 90-6704, slip. op. at 6-7 (U.S. Supreme Court March 9, 1992) (Emphasis added.)

The U.S. Supreme Court is clearly indicating that when racial hatred is relevant to the crime, i.e., the racial hatred is the perpetrator's reason for committing the crime, this information is completely relevant in sentencing. How then can the majority suggest that punishing motive is impermissible?

I repeat. Section 939.645, Stats., is not concerned with speech or thought. It is concerned with intentional selection. It becomes operative not just when a person's speech evinces the discriminatory selection, but rather anytime the choice of a victim from a protected class is shown to be selective rather than random, discriminating rather than indiscriminate, or designed rather than happenstance.

The penalty enhancer statute also does not seek to punish the motive of a perpetrator. Neither a perpetrator's bigoted beliefs, nor his or her motivation for intentionally selecting a victim because of a protected status are punished. Again, it is the act of selecting a victim because of his or her race, color, or etc., that is proscribed. If a perpetrator seeks out a Jewish person to physically assault, his intent is not just to injure, but to injure a Jewish person. He may be motivated by a hatred of Jewish people, a calling from God to sacrifice a Jewish person, or some other irrational motive. This law does not look to motive. This law does not look at why the perpetrator sought out a Jewish person. It looks only to

whether the fact that the victim was Jewish was a substantial factor in the defendant's purposeful choice of the victim.

Similarly, under the facts of the present case, even if Mitchell could show that his motive was not a hatred of whites, his conduct would still be punishable under the statute. As the State points out, Mitchell's motive could have been to impress the group of boys that accompanied him. Nevertheless, the statute would still apply. Its focus is not on bigoted or hateful motivations. Rather, it punishes the action of intentionally selecting a victim on the basis of a protected status listed in the statute. As Mitchell himself emphasized at oral arguments, the term "hate crimes" statute is a misnomer. The crimes that fall under the statute may be motivated by many emotions; the intentional selection is what is prohibited. The statute looks at intent, and statutes are used in many ways to punish crimes differently based on the perceived seriousness of the intent of the perpetrator. For example, an intent to kill is punished greater than an intent showing utter disregard for human life. Likewise, a reckless intent is punished less than an intent showing utter disregard for human life.

Section 939.645, Stats., does not attempt to prohibit or punish bigotry, antisemitism, or the like. It does attempt to limit their effects. An individual's freedom to express his or her views in writing, speech, or otherwise is not regulated or chilled by this statute. What is prohibited is the act of intentionally selecting victims because of their protected status. Why a Black or a Jewish person or any other person of a protected class was chosen as the victim is not relevant. What is relevant is that the victim is intentionally chosen because of the victim's protected status.

I conclude that sec. 939.645, Stats., legitimately regulates criminal conduct, and raises no issue under the First Amendment. It does not punish speech, thought, or

even motivation, nor does it sweep within its ambit actions which are constitutionally protected as to render it unconstitutionally overbroad.

II.

It is necessary to discuss the vagueness and equal protection issues, even though they are not reached by the majority. These issues are raised by Mitchell. I therefore take this opportunity to address each issue.

Mitchell asserts that this legislative attempt to alleviate bias related crime is unconstitutionally vague. Specifically he contends that the phrases "intentionally selects," "because of," and "race," are vague, undefined, and ambiguous. Thus, he argues that, they lead to erratic convictions and unfair prosecutions. I disagree.

A statute is "unconstitutionally vague if it fails to afford proper notice of the conduct it seeks to proscribe or if it encourages arbitrary and erratic arrests and convictions." *Milwaukee v. Wilson*, 96 Wis. 2d at 16 (footnote omitted). This court has repeatedly indicated that "[t]he principles underlying the void for vagueness doctrine . . . stem from concepts of procedural due process." *State v. Popanz*, 112 Wis. 2d 166, 172, 332 N.W.2d 750 (1983).

To determine whether a statute survives a vagueness challenge, this court has applied a two-part analysis. First, the statute must be sufficiently definite to give persons of ordinary intelligence who wish to abide by the law adequate notice of the proscribed conduct. Second, the statute must provide adequate standards for those who enforce the laws and adjudicate guilt. *See State v. McManus*, 152 Wis. 2d 113, 135, 447 N.W.2d 654 (1989) (citing *City of Oak Creek v. King*, 148 Wis. 2d 532, 546, 436 N.W.2d 285 (1989)). "However, a statute need not define with absolute clarity and precision what is and what is not unlawful conduct." *State v. Hurd*, 135 Wis. 2d 266, 272,

400 N.W.2d 42 (Ct. App. 1986). Furthermore, to survive a vagueness challenge it is not necessary, "for a law to attain the precision of mathematics or science . . .." *Milwaukee v. Wilson*, 96 Wis. 2d at 16. This court has summarized its analysis under a vagueness challenge as follows:

> Thus it is not sufficient to void a criminal statute or regulation to show merely that the boundaries of the area of proscribed conduct are somewhat hazy, that what is clearly lawful shades into what is clearly unlawful by degree, or that there may exist particular instances of conduct the legal or illegal nature of which may not be ascertainable with ease. Before a statute or rule may be invalidated for vagueness, there must appear some ambiguity or uncertainty in the gross outlines of the duty imposed or conduct prohibited such that one bent on obedience may not discern when the region of proscribed conduct is neared, or such that the trier of fact in ascertaining guilt or innocence is relegated to creating and applying its own standards of culpability rather than applying standards prescribed in the statute or rule. *State v. Courtney*, 74 Wis. 2d 705, 711, 247 N.W.2d 714 (1976).

Mitchell's first contention is that the failure of the statute to define the phrase "intentionally selects" renders the statute unconstitutionally vague because it is not a term easily understood by ordinary persons who wish to abide by the law, and fails to provide adequate standards for enforcers of its provisions. I disagree. I conclude that the phrase "intentionally selects" is sufficiently definite to provide notice of prohibited conduct to persons of ordinary intelligence who wish to abide by the law and adequate standards for those who enforce the laws and adjudicate guilt.

The word "intentionally" is a word that is easily understood. "Intentionally" means a purpose to do the thing or cause the result specified. Lay persons of ordinary

intelligence do not need to scurry to their dictionaries in order to understand the meaning of this well recognized and easily understood word.

Nor is this a word that is a stranger to law enforcement officials, judges, and juries. "Intentionally" is defined in the criminal code at sec. 939.23(3), Stats.:

> 'Intentionally' means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result. In addition, except as provided in sub. (6), the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word 'intentionally'.

The Wisconsin statutes, particularly criminal statutes, are replete with references to "intentional" acts, or acts or conduct done "intentionally." *See, e.g.*, sec. 939.051(b), Stats. (whoever intentionally aids and abets the commission of a crime may be charged as a principal); sec. 939.48 (person is privileged to threaten or intentionally use force against another for the purpose of self defense); sec. 940.07 ("[w]hoever knowing the vicious propensities of any animal intentionally allows it to go at large . . .."); *see also* secs. 7.37(5), 19.58, 12.13, 26.05(3)(b), 26.14(8) and 20.927(4)). Unquestionably, law enforcement officials, judges, and juries are quite capable of applying the word to varied situations in the resolution of a legal case.

Likewise, the word "selects" is well understood and easily defined. "Select" means "to choose from a number or group . . . by fitness, excellence, or other distinguishing feature. . .." Webster's Third New International Dictionary 2058 (1961). As the court of appeals concluded, the meaning of the phrase "intentionally selects" is easily discerned. It means to purposely choose or pick out. I conclude that the phrase "intentionally selects" is sufficiently clear to persons of ordinary intelligence to

afford a practical guide for law-abiding behavior and is capable of application by those responsible for enforcing the law.

In the court of appeals, Mitchell appeared to make an alternative vagueness argument with respect to the phrase "intentionally selects." The court of appeals explained his argument as follows:

> Assuming that 'intentionally selects' means to purposely pick out, Mitchell apparently argues that the term is still ambiguous as applied. If we understand Mitchell's argument correctly, the underlying rationale for Mitchell's attention to the term 'intentionally selects' is this: Any time an accused is a different race than the alleged victim, it can be viewed as a 'hate crime' suitable for use of the penalty enhancer since there is no way to discern whether the victim was picked out because of race or because of other reasons. Under the statute, the very fact that this particular victim *was* picked out indicates that the victim was 'intentionally selected.' Therefore, Mitchell argues that so long as the accused 'knows' the victim is of a different race, a different color or a different religion, the accused will be subject to the statute. This, he claims, allows its use by prosecutors and police without any guidelines. *State v. Mitchell*, 163 Wis. 2d 652, 661-62, 473 N.W.2d 1 (Ct. App. 1991).

Although Mitchell does not appear to have abandoned this argument, he seems to have framed it in slightly different terms. Mitchell now appears to argue that the statute is vague because it does not indicate to what extent a victim's protected status must affect the perpetrator's selection decision in order to implicate the statute. In other words, he argues that because the meaning of the phrase "because of" is vague and not ascertainable by an ordinary person, a fair application of the statute is impossible, and it will

likely be applied any time an accused is a different race than the victim. I do not agree.

I agree with the court of appeals that the operative terms in the statute are not whether the victim is of a different "color" or "race," or other protected status. Rather, the operative terms are whether the victim was "intentionally selected" or purposely picked out "because of" the victims race, color, etc. "If a victim is of a different race . . . than the perpetrator, that fact alone will not allow the penalty enhancer to be used." *Mitchell*, 163 Wis. 2d at 662. What is important is whether the perpetrator picked out the victim because of his or her race. The key is the "intentional selection because of" the victims protected status.

I reject Mitchell's contention that the language "intentionally selects because of" fails to define with sufficient specificity the conduct which is proscribed. I again emphasize that "'[T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . ..'" *Bachowski*, 139 Wis. 2d at 410. (citing *Roth v. United States*, 354 U.S. 476, 491 (1957)). Giving the phrase "because of" its ordinary commonsense meaning, *see State v. Whittrock*, 119 Wis. 2d 664, 670, 350 N.W.2d 647, measured by common understandings and practices, I conclude that where a victim's protected status is a substantial factor in the perpetrator's selection decision, the enhancement statute applies.

It is unreasonable to construe "because of" to mean that the statute applies where race, color, or the like is only a minor or de minimis factor in the perpetrator's selection decision. Such a construction in light of the legislature's rationale (see Section III below) would be absurd. Nor would it be reasonable to construe the phrase to mean that the statute applies only when race, color, or the like is the

sole factor in the perpetrator's selection decision. Legislatures realize that seldom, if ever, do people act based on one factor or consideration. Rather, people's conduct is largely driven by a multitude of factors which have varying impacts on their decisions. A reasonable reading of the statute is that it creates liability where "but for" the victim's protected status, the perpetrator would not have selected the victim for the crime. Thus, I conclude the victim's status must be a substantial factor in the selection decision to the extent that in the absence of that status the perpetrator would not have selected the victim.

I therefore conclude that the legislature's use of the words "because of," in sec. 939.645, Stats., although perhaps not as precisely drafted as possible, conveys "sufficiently definite warning as to the proscribed conduct" to withstand a vagueness challenge. Furthermore, Mitchell's conduct plainly falls within the prohibited zone of the statute, as there is no doubt that Gregory Reddick's race was a substantial factor in Mitchell's selection of him as his victim.[4]

Mitchell also contends that the word "race" is vague and ambiguous. I agree with the State that it is difficult to determine the basis of defendant's argument in this regard.

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[4]The defendant has waived any challenge he might have had to the propriety of the jury instruction given in this case. However, even if it were not waived, the defendant would be hard pressed to show that the instruction given in this case caused him harm. The instruction in this case indicated that in order for the jury to conclude that the defendant intentionally selected the victim because of his race they must conclude "that the defendant knew that Gregory Reddick was a member of the white race and committed the crime of aggravated battery against him for the reason that he was a member of that race." While this instruction may have given the jury the impression that the victim's race had to be the sole factor in the defendant's selection decision, it certainly did not give the impression that a finding that race was anything less than a substantial factor would trigger the penalty enhancer statute.

I construe Mitchell's argument, as did the court of appeals, to be that persons of ordinary intelligence do not know the difference between the terms "race" and "color." This argument has no merit.

I find it difficult to believe that persons of ordinary intelligence would not understand what the word "race" means. Furthermore, even if there were difficulty understanding the literal difference in the terms "race" and "color," both are terms covered in the statute. Selection because of race or color is prohibited by the statute. Therefore, if people of ordinary intelligence understand the general parameters of either term, they have fair notice of the conduct that is prohibited.

Mitchell also suggests that the statute is unconstitutional because law enforcement authorities, judges, and juries may or may not pursue penalty enhancement under the statute based on their own prejudices or views toward the race, or religion, etc., of the victim or the defendant. I understand Mitchell's argument to be a constitutional challenge based on vagueness, i.e., because the statute is vague, law enforcement officials will use their own prejudices to apply the statute. This argument is meritless.

As I concluded above, the statute is sufficiently clear to persons of ordinary intelligence to provide adequate standards for those who enforce the laws, such that they will not be relegated to creating their own standards. The law enforcement responsibility to determine whether the conduct proscribed by the penalty enhancement statute can be proven in a particular case is no more difficult than similar determinations routinely made by officials in enforcing the law. Furthermore, the potential for improper jury bias and prosecutorial abuses is present in many cases. Safeguards exist to protect against these abuses. For example, this court has reviewed prosecutorial charging decisions to determine if there has been an abuse of discretion or discriminatory prosecution. *See State v.*

Karpinski, 92 Wis. 2d 599, 609, 285 N.W.2d 729 (1979). This court has held that a prosecutor's decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. *Sears v. State*, 94 Wis. 2d 128, 134, 287 N.W.2d 785 (1980). Thus, discriminatory abuses can be dealt with through other law; its potential does not render a statute vague.

The last contention made by Mitchell concerning vagueness is that the statute does not provide standards to help law enforcement determine what evidence can be used to prove a violation of the statute. A statute does not have to dictate rules in regard to admissibility of evidence. Just as in any other case, the Wisconsin Rules of Evidence provide a comprehensive guide for law enforcement. Hypothetical speculation as to how far back into a person's life a prosecutor can delve to prove the prohibited conduct of intentional selection does not render the statute unconstitutional. The rules of evidence which deal with relevancy provide adequate standards to guide law enforcement in determining the appropriate nexus between evidence and alleged misconduct, such that the evidence is admissible. *See* Wisconsin Rules of Evidence 904.01, 904.02, and 904.03.

I conclude that the legislature has defined the conduct proscribed by sec. 939.645, Stats., with sufficient specificity to meet constitutional requirements with respect to vagueness. The law is clear in its terms and its meaning. When the victim's protected status (i.e., race, religion, etc.) is a substantial factor in the defendant's purposeful choice of a victim, the statute becomes operative.

III.

Lastly, I discuss Mitchell's equal protection challenge. In *McManus*, 152 Wis. 2d at 130-31, this court summarized the law with respect to equal protection:

> Equal protection . . . requires that there exist a reasonable and practical grounds [sic] for the classifications drawn by the legislature. . . . Equal protection does not deny a state the power to treat persons within its jurisdiction differently; rather, the state retains broad discretion to create classifications so long as the classifications have a reasonable basis. The fact a statutory classification results in some inequity, however, does not provide sufficient grounds for invalidating a legislative enactment. (Citations omitted).[5]

If the statute in question does not impinge on a fundamental right or create a classification based on a suspect criterion, the legislative enactment "'must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate government interest.'" *Id.* (citation omitted). "If the classification is reasonable and practical in relation to the objective, that is sufficient and doubts must be resolved in favor of the reasonableness

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[5]The Equal Protection Clause of the United States Constitution provides:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws. Amendment XIV, Section 1, United States Constitution.

The Equal Protection Clause of the Wisconsin Constitution Provides:

> All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness . . . . Article I, Section 1, Wisconsin Constitution.

This court has held that the equal protection clause of the Wisconsin Constitution is the substantial equivalent of its respective clause in the federal constitution. *See State ex rel. Cresci v. H&SS Department*, 62 Wis. 2d 400, 414, 215 N.W.2d 361 (1974).

of the classification." *State v. Jackman*, 60 Wis. 2d 700, 705-06, 211 N.W.2d 480 (1973). I examine sec. 939.645, Stats., under a rational basis test. The present case does not impinge on a fundamental right or create a classification based on a suspect criterion.

Section 939.645, Stats., is violated when the victim's protected status is a substantial factor in the defendant's purposeful choice of a victim for certain crimes. When such intentional selection on account of status is proved, penalties in addition to the underlying crime are assessed. I perceive this legislation to be a legislative judgment that crimes involving intentional selection of a victim because of the victim's status cause greater harm to victims and to the public than do crimes in which status is not a factor. Because of this, the legislature has chosen to punish these intentional selection crimes more severely than conviction of the underlying crime would otherwise require.

Regulation of harmful conduct is a legitimate exercise of a state's power. The function of the legislature in drafting criminal laws is always to make reasoned decisions concerning the social harm of particular conduct. The criminal laws are replete with similar legislative judgments involving enhanced penalties. For example, sec. 939.63, Stats., increases the penalty for a crime if the person possesses, uses, or threatens to use a dangerous weapon. Similarly, if a person commits a crime while his or her identity is concealed, the penalty for the underlying crime may be increased under sec. 939.641. *See also*, sec. 939.62 (increased penalty for habitual criminality); sec. 939.621 (increased penalty for certain domestic abuse offenses); sec. 939.64 (increased penalty for committing a felony while wearing a bullet-proof garment); sec. 948.02 (sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of Class B felony, while sexual contact or intercourse with a person who has not attained the age of 16 is a Class C felony); sec. 940.31 (kidnapping, a Class B felony under the statute is enhanced to a Class A felony when it is committed with the

intent "to cause another to transfer property in order to obtain the release of the victim").

There is ample evidence to support the legislature's conclusion that intentional selection of a victim from a protected class causes a greater harm to its victims as well as to society than do crimes where the victim's status is not a factor. Many commentators have discussed the widespread psychological harms caused by crimes that appear to be bias related. *See generally*, Delgado, Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling, 17 Harv. C.R.-C.L. L. Rev. 133 (1982); Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320 (1989); Developments in the Law Sexual Orientation and the Law, 102 Harvard L. Rev. 1508, 1541 (1989). These theorists posit that bias related crimes cause injury and damage far beyond that created by similar criminal conduct which does not appear to be bias related because of their tendency to perpetuate prejudice and victimize classes of people. *See generally*, Gellman, supra at 340. Crimes that appear to be based on intentional selection because of the victim's status create fear not only among those who share the victim's race, color, religion, etc; but they also threaten society in general. Reports of intentional selection, even if perhaps not motivated by bigotry, create the appearance of bigotry and hatred. These crimes breed fear, misunderstanding, misconceptions, and isolation between different classes of people. The Wisconsin legislature has attempted to hinder these crimes, not by regulating speech, thought, or even motivation, but rather by enhancing the criminal penalty for any crime, however motivated, where the perpetrator purposefully selects a victim because of a protected status. I conclude that the legislature's action was eminently reasonable and does not violate principles of equal protection.

Mitchell posits an additional equal protection challenge to sec. 939.645, Stats. Mitchell argues that because sec. 939.645 applies only to crimes listed in the Criminal Code,

chs. 939-948, and not to other crimes found in the Wisconsin statutes, it violates equal protection. Mitchell contends that this differentiation creates a classification based on suspect criterion which violates equal protection for three reasons: (1) the statute discriminates against the poor and uneducated because they are most frequently accused of the crimes listed in chs. 939-948, and in contrast "white collar" criminals are exempt from the penalty enhancement because they commit the crimes found outside these chapters; (2) treating crimes proscribed under chs. 939-948 differently from other crimes is unreasonable because some crimes found outside chs. 939-948 are more serious than those found in chs. 939-948; (3) it is unreasonable to exclude certain crimes, such as illegal restraints of trade, hunting violations, motor vehicle violations, consumer fraud, drugs and narcotics, etc., found outside chs. 939-948 from the penalty enhancement provision. Mitchell's arguments are without merit.

Section 939.645, Stats., singles out no particular group for different treatment, and thus no suspect classification is involved. As the State points out, there simply is no "white collar/poor people" distinction found in sec. 939.645. Mitchell has offered no evidence to support his theory that poor or minorities are the groups usually accused of committing crimes under chs. 939-948. Furthermore, several crimes listed in the Criminal Code involve what are traditionally viewed as "white collar" crimes. *See, e.g.*, sec. 943.70, (theft of trade secrets); sec. 943.38 (forgery); sec. 943.70 (computer crimes); and sec. 946.12 (misconduct in public office). Likewise, crimes that are not traditionally viewed as "white collar" crimes are found outside chs. 939-948. *See, e.g.*, ch. 161 which covers drug offenses. The dichotomy which Mitchell seeks to establish does not exist and his argument is without merit.

Mitchell's second argument is also without merit. Mitchell contends that the classification is not proper because some crimes found outside chs. 939-948, Stats.,

are more serious than crimes in the Criminal Code. Even if, as Mitchell suggests, some crimes outside chs. 939-948 pose more serious harms, equal protection does not require legislatures to order "evils hierarchically according to their magnitude and to legislate against the greater before the lesser." *U.S. v. Holland*, 810 F.2d 1215, 1219 (D.C. Cir. 1987), *cert denied*, 481 U.S. 1057 (1987).

Lastly, Mitchell claims it is irrational to exclude certain crimes from the penalty enhancer statute. Mitchell points to crimes such as hunting violations and motor vehicle violations and argues that these crimes may be committed against specially selected victims just as those covered by the enhancer. However, as the State notes, this assertion is also meritless because although the harm is undeniable when victims are singled out for non-criminal code crimes, the legislature is not required to legislate against all harms. *See McDonald v. Board of Election*, 394 U.S. 802, 809 (1969). Therefore no equal protection violation exists.

The State offers two further explanations for why the legislature chose to apply sec. 939.645, Stats., only to crimes grouped in the criminal code chs. 939-948. First, the crimes which are most likely to involve bias related victim selection are listed in the Criminal Code. For example, battery, homicide, and criminal damage to property are listed in the Criminal Code. Second, by limiting application of the penalty enhancer to the Criminal Code, the legislature was able to quickly identify with certainty the majority of offenses which are most appropriate for penalty enhancement. The limiting application "avoided the cumbersome task of examining the multitude of crimes found outside the criminal code for possible unanticipated and undesired results." I find these explanations rational and practical in light of the purpose behind sec. 939.645 of preventing and deterring bias related crime.

IV.

In conclusion, no one disagrees with the majority's statement that "punishment of one's thought, however repugnant the thought, is unconstitutional." The majority misses the point entirely. Of course the Constitution protects bigoted and hateful thoughts, but it does not lend its protection to the person who harbors such thoughts and then *acts* on them. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) ("acts of invidious discrimination in the distribution of publicly available goods, [and] services . . . like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, . . . are entitled to no constitutional protection"); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) ("'[i]nvidious . . . discrimination . . . has never been accorded affirmative constitutional protections.' . . . There is no constitutional right, for example, to discriminate in the selection of who may attend a private school or join a labor union."); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) ("'the constitution places no value on discrimination', . . . and while '[i]nvidious private discrimination may be characterized as . . . protected by the First Amendment . . . it has never been accorded affirmative constitutional protections'"). Is it the majority's conclusion that it is permissible to act on bigoted beliefs?

I conclude that the penalty enhancer statute is neither vague nor overbroad. I further conclude that the statute does not violate principles of equal protection. Accordingly, I dissent.

153 Wis. 2d 652
STATE of Wisconsin,
Plaintiff-Respondent,

v.

Todd MITCHELL, Defendant-Appellant,
No. 90-2474-CR.
Court of Appeals

Submitted on briefs April 29, 1991.
Decided June 5, 1991.

(Also reported in 473 N.W.2d 1.)

APPEAL from judgments and an order of the circuit court for Kenosha county: JEROLD W. BREITENBACH, Judge. *Affirmed.*

On behalf of the defendant-appellant, the cause was submitted on the brief of *Bernard Goldstein of Goldstein & Kagen* of Milwaukee.

On behalf of the plaintiff-respondent, the cause was submitted on the brief of *James E. Doyle*, attorney general, and *Paul Lundsten*, assistant attorney general.

Before Nettesheim, P.J., Brown and Anderson, JJ.

BROWN, J. Todd Mitchell challenges the constitutionality of the "hate crimes" penalty enhancer law in Wisconsin, sec. 939.645, Stats., claiming that it is vague and overbroad and violates equal protection principles. We hold that the statute clearly gives persons of ordinary intelligence fair notice of the conduct prohibited, provides standards for those who enforce the laws, and does not "chill" citizens from exercising protected constitutional freedoms. Thus, the statute is neither vague nor overbroad. We will not reach the equal protection issues

because of waiver. We also discuss other nonconstitutional issues and affirm.

Gregory Reddick, a fourteen-year-old white male, was walking down a street near the Renault apartment building in Kenosha. He was wearing "British Knights" brand athletic shoes. Several black males rushed across the street at Reddick, knocked him to the ground, surrounded him, and beat him until he was unconscious. Police found him a short time later, still unconscious, and with his shoes missing. Reddick was severely injured; he was comatose for about four days; and his injuries might have been fatal had he not received medical treatment.

Testimony revealed the following facts about the beating and theft. A group of young black men and boys were gathered at the Renault apartment building on the evening of the incident. Mitchell, who was nineteen at the time, was one of the older members of the group. Some of the group were inside the apartment complex discussing the movie "Mississippi Burning;" in particular, they were talking about that part of the movie where a white man beat a young black boy who was praying. There was no evidence that Mitchell was involved in this discussion.

About ten members of the group that was inside moved outdoors. There, people were talking about the movie. Before the victim appeared, Mitchell said to the gathering, "Do you all feel hyped up to move on some white people?"

A short time later, Reddick approached on the other side of the street. Reddick said nothing provocative. Mitchell said, "You all want to fuck somebody up?" Then he said, "There goes a white boy; go get him." He counted to three and pointed this way and that way, indicating that the group should surround Reddick.

Several persons in the group immediately took off running toward the white youth. Most ran directly at him. One person in the group kicked Reddick, knocking him to

the ground. Several attackers then surrounded Reddick and repeatedly stomped, kicked and punched him. This lasted about five minutes. One of the attackers said he thought Reddick was dead.

One of the attackers returned from the beating possessing Reddick's "British Knights" shoes. He showed them to different people. Mitchell was in the area when the shoes were being shown.

Mitchell was convicted of aggravated battery, party to a crime, and the jury separately found that Mitchell intentionally selected the battery victim because of the victim's race, pursuant to sec. 939.645, Stats. Mitchell was also convicted of theft, party to a crime.

Mitchell's major challenge is to the constitutionality of sec. 939.645, Stats., dubbed the "hate crimes" statute. The constitutionality of a statute is a question of law which this court may review without deference to the trial court. *State ex rel. Jones v. Gerhardstein*, 141 Wis. 2d 710, 733, 416 N.W.2d 883, 892 (1987). Here, there is not even a trial court opinion to review, as the constitutionality issues are raised for the first time on appeal. Nonetheless, challenges to the facial constitutionality of statutes are a matter of subject matter jurisdiction and, therefore, cannot be waived. *State ex rel. Skinkis v. Treffert*, 90 Wis. 2d 528, 536-39, 280 N.W.2d 316, 320-21 (Ct. App. 1979). The equal protection argument, however, is not a challenge to a facial constitutionality of the statute. We deem this specific argument waived and we will not address it.

Before addressing Mitchell's vagueness and overbreadth challenges to sec. 939.645, Stats., we briefly touch upon the burden he must carry. Generally, when a defendant challenges the constitutionality of a statute, he or she bears the heavy burden of establishing beyond a reasonable doubt that the statute is unconstitutional. *State v. Dums*, 149 Wis. 2d 314, 319-20, 440 N.W.2d 814, 815-16 (Ct. App. 1989). The defendant must do this in

light of the strong presumption favoring the constitutionality of the statute. *State v. Hurd*, 135 Wis. 2d 266, 271, 400 N.W.2d 42, 44 (Ct. App. 1986).

There is an exception to that rule. When a statute infringes on the exercise of first amendment rights, the burden of establishing its constitutionality is on its proponent. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). Mitchell claims that the statute punishes activities protected by the first amendment. He therefore argues that the state has the burden in this case. For the reasons that follow, we disagree and impose the burden on Mitchell himself.

We first discuss the vagueness argument. Section 939.645, Stats., provides an increase in penalties for any person committing a crime under chs. 939 to 948, Stats., who, in addition:

> *Intentionally selects* the person against whom the crime . . . is committed or selects the property which is damaged or otherwise affected by the crime . . . because of the *race*, religion, *color*, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.

Section 939.645(1)(b), Stats. (emphasis added).

Mitchell points to two terms in the statute, "intentionally selects" and "race" as being undefined and ambiguous. He claims two consequences result. First, that the statute fails to give proper notice of prohibited conduct. Second, that the statute encourages arbitrary or erratic convictions because there are no guidelines for prosecutors or police.

Mitchell's claims track the two-step process in determining vagueness claims. The steps are: (1) the statute must be sufficiently definite to give persons of ordinary intelligence who seek to avoid its penalties fair

notice of the conduct required or prohibited; and (2) the statute must provide standards for those who enforce the laws and adjudicate guilt. *State v. McManus*, 152 Wis. 2d 113, 135, 447 N.W.2d 654, 662 (1989).

A legal principle to be kept in mind when analyzing a statute for vagueness is that the statute need not define with absolute clarity and precision what is and what is not unlawful conduct. *Hurd*, 135 Wis. 2d at 272, 400 N.W.2d at 45. For the statute to be unconstitutional, the ambiguity must be such that "one bent on obedience may not discern when the region of proscribed conduct is neared, or such that the trier of fact in ascertaining guilt or innocence is relegated to creating and applying its own standards of culpability rather than applying standards prescribed in the statute or rule." *State v. Courtney*, 74 Wis. 2d 705, 711, 247 N.W.2d 714, 719 (1976).

It should be further noted that a defendant who plainly falls within the prohibited zone of a statute cannot mount a vagueness challenge by building a case for some hypothetical person who might lie outside the zone. *See id.* at 713, 247 N.W.2d at 719.

The first claim is that the terms "intentionally selects" and "race" are not defined in the statute and are incapable of clear understanding by an ordinary person. We do not agree. The word "intentionally" is defined in the criminal code. Section 939.23(3), Stats., states in pertinent part:

> "Intentionally" means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result. In addition . . . the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word "intentionally."

Thus, the word "intentionally" means a purpose to do the things specified. It is easily defined.

The word "selects" is also easily defined. We find it difficult to believe that persons of ordinary intelligence would not understand what this word means. Even so, when undefined, nontechnical words are used in a statute, they are given their ordinary and accepted meaning which may be ascertained from a recognized dictionary. *State v. Wittrock*, 119 Wis. 2d 664, 670, 350 N.W.2d 647, 651 (1984). Webster defines "select" as "to take by preference from a number or group: pick out." *Webster's New Collegiate Dictionary* 1047 (1977). Therefore, the term "intentionally selects" means to purposely pick out.

Mitchell also argues that the word "race" is ambiguous. We construe his argument here to be that persons of ordinary intelligence do not know the difference between the term "race" and "color," another term used in the statute. We do not need to resort to a recognized dictionary to resolve this claim. Reddick was white and is of a different race and color than the attackers. The statute prohibits purposely picking out a person of race or color. Under either term, the law was violated. We do not understand, and Mitchell does not enlighten us, how he has standing to raise this particular argument since his conduct plainly falls within the prohibited zone of the statute regardless of the literary difference between the terms "race" and "color." This issue is meritless and we discuss it no further.

Having determined that the term "intentionally selects" is easily defined, we turn to what we consider to be Mitchell's major argument regarding vagueness. Assuming that "intentionally selects" means to purposely pick out, Mitchell apparently argues that the term is still ambiguous as applied. If we understand Mitchell's argument correctly, the underlying rationale for Mitchell's attention to the term "intentionally selects" is this: Any time an accused is a different race than the alleged victim, it can be viewed as a "hate crime" suitable for use of the penalty enhancer since there is no way to discern whether the victim was picked out because of race or because of other

reasons. Under the statute, the very fact that this particular victim *was* picked out indicates that the victim was "intentionally selected." Therefore, Mitchell argues that so long as the accused "knows" the victim is of a different race, a different color or a different religion, the accused will be subject to the statute. This, he claims, allows its use by prosecutors and police without any guidelines.

We disagree. The operative term in the statute is not whether a person "intentionally selects" a victim. Most, if not all, criminals can be said to "intentionally select" their victims. Nor is the operative term whether that victim who is intentionally selected is of a different "race" or "color," for instance. The operative term is "because." If a person is selected *because* of race, color, disability, and the like, then the statute becomes operative. If a victim is of a different race, for instance, than the perpetrator, that fact alone will not allow the penalty enhancer to be used. Nor will it be enough that the perpetrator "picked out" or "selected" a person of a different race. The key is whether the selection was *on account of* race. If there is proof of that, then the enhancer becomes operative.

Thus, the statute is not vague on its face. People of ordinary intelligence can read the statute and determine that if they intentionally select a victim who happens to be of a different race, for example, they will not be subject to an enhancer. However, if they select that victim *because of* race, they will be subject to it. This also provides a proper standard for prosecutors and police. They must have some evidence that the victim was selected because of race. The vagueness argument fails.

We next discuss overbreadth. A statute may be constitutionally overbroad if it intrudes on a substantial amount of constitutionally protected activity. Our supreme court explained overbreadth as follows:

> A statue [sic] is overbroad when its language, given its normal meaning, is so sweeping that its sanctions may be applied to constitutionally protected conduct which the state is not permitted to regulate. The essential vice of an overbroad law is that by sweeping protected activity within its reach it deters citizens from exercising their protected constitutional freedoms, the so-called "chilling effect."

Bachowski v. Salamone, 139 Wis. 2d 397, 411, 407 N.W.2d 533, 539 (1987) (citations omitted).

Unlike a vagueness argument, an overbreadth challenge may include hypothetical speculation. Therefore, even if no "chilling effect" was present in the defendant's particular case, a defendant may still argue that the statute is overbroad because it chills the rights of others. *See City of Milwaukee v. Wilson*, 96 Wis. 2d 11, 19-20, 291 N.W.2d 452, 457-58 (1980). This is true when the alleged overbreadth implicates free speech rights. *See id.*

We agree with the state that Mitchell's overbreadth argument is "hard to follow." He appears to assert that the statute is overbroad because it punishes free speech. He seems to argue that slurs, epithets, derogatory and racial expressions are simply part of everyday human behavior and are protected free speech when not involved in the commission of a crime. He apparently argues that there is no good reason why this same free speech should not also be protected during the commission of a crime. He seems to reason that the statute is criminalizing speech just because the perpetrator exercises his or her freedom of speech at the same time as the commission of a crime. By allowing the state to use the defendant's verbal statements against him, the state thereby discourages free speech.

We disagree that there is an infirmity in the statute on overbreadth grounds. The statute is directed at the action of selecting a victim and not at speech. Section 939.645, Stats., does not impede or punish the right of persons to

express themselves regarding race or any other status or group listed. Words, or even beliefs, are not punished here. What *is* punished is conduct. The words used by a defendant are merely circumstantial evidence that the defendant specially selected the victim because of race or for other reasons listed. *Cf. People v. Grupe*, 532 N.Y.S.2d 815, 818 (N.Y. Crim. Ct. 1988).

Thus, evidence of the words uttered by a defendant are used no differently than they are in other criminal statutes. The words are simply probative as to an element of a crime. Here, Mitchell's words were evidence that he intentionally selected Reddick because of race. That is why Mitchell has the burden of proof in this case instead of the state. The statute does not proscribe free speech. It is not a law limiting the time, place or manner of speech. It is a law proscribing certain conduct where words can be used as circumstantial evidence of such conduct.

Mitchell next asserts that his conviction for aiding and abetting the theft of the victim's shoes is not supported by the record. Primarily, he argues that there was no evidence showing his intent to commit a theft or participate in a theft. In particular, he reasons that, although the jury may infer that he incited a battery, they may not infer that he intended to encourage a theft. He asserts that the person who stole the shoes did so on his own and without any encouragement or aid from Mitchell.

We do not agree. The jury had evidence from which it could infer that Mitchell encouraged and directed people to "move on" and "fuck up" the victim. We agree with the state that this encouragement was general and not limited to inflicting injury. By encouraging and directing the persons who attacked, Mitchell assisted the criminal mischief. The resultant beating, leaving the victim incapacitated, was one natural and probable consequence of the encouragement. The theft of the shoes was another. Although Mitchell raises other arguments about the theft conviction, they are all variations of the same theme--that

the encouragement was for the purposes of battery and must be separated from any act of theft since Mitchell did not intend for a theft to take place. However, we hold that the theft is a natural and probable consequence of his incitement, just as was the battery.[1]

By the Court.--Judgments and order affirmed.

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[1]One of Mitchell's arguments is that the trial court never instructed on the "natural and probable consequences." The record indicates that there was such an instruction given.

STATE OF WISCONSIN
CIRCUIT COURT KENOSHA COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. DECISION & ORDER

TODD MITCHELL, File 89-CF-434

Defendant.

The defendant by his attorney, Bernard Goldstein, has moved the court for an order granting the defendant post-conviction relief. The plaintiff appeared at the time of hearing in this matter by Assistant District Attorney and the defendant appear by Attorney Goldstein. After consideration of the record, argument of counsel and the controlling law, the court renders the following

DECISION

The defendant reiterates the contention that Section 939.645, Stats., is unconstitutional. The court has previously decided this motion on the record. There is no argument presented which would change the holding of the court that the statute is constitutionally permissible. The statute does not require that the victim and perpetrator be of different races, religion, color, disability, sexual orientation or national origin as argued by the defendant's brief on the issue as filed by the trial court. It is regrettable that the defendant here is of a minority race that the law was intended to protect. But, that does not make the statute unconstitutional.

The defendant next maintains that there is no credible evidence in the trial record establishing that defendant was a principal or party to the crime of theft from a person. The defendant maintains that he must have done some act as a principal or party to a crime in direct furtherance or commission of that crime.

The court finds that one who intentionally aids and abets the commission of a crime is responsible not only for the intended crime, if it is in fact committed, but as well for other crimes which are committed as a natural and probable consequence of the intended criminal acts. *State v. Asfoor*, 75 Wis.2d 411, 249 N.W.2d 529 (19770, *State v. Cydzik*, 60 Wis.2d 683, 211 N.W.2d 421 (1973) and *State v. Stanton*, 106 Wis.2d 172, 316 N.W.2d 134 (Ct. App. 1981). The jury was instructed and found by their verdict that the crime of theft from the person was a natural and probable consequence of the intended acts. Certainly, that finding by the jury is not beyond the general experience of the court. It is not unreasonable to expect that a "mugging" will include the taking of property from the person mugged. The court finds and concludes that the acts constituting the criminal charge as contained in Count Two of the information are the natural and probable consequences of the acts intended against the victim.

The defendant maintains that a verdict was not submitted to have the jury answer with a "not guilty" to the lesser included offense. The jury found the defendant guilty of the lesser included offense. A verdict was submitted which provided the jury the opportunity to find the defendant not guilty of the greater charge of aggravated battery as was alleged in Count One of the information. The usual practice of the court was not followed in this case. The court does usually provide a more general type of "not guilty" verdict. However, the court finds that the form of the verdicts are correct and that the jury unanimously agreed upon their verdict. The jury only returned one completed verdict. The court finds that polling of the jury revealed no question on the intent

of the jury. The defendant provides no law which would require the court to grant a new trial on this basis. The court finds no merit in the contention that the jury was misled or did not have the appropriate alternatives in the forms of the verdict.

The defendant next maintains that the defendant was entitled to instructions for included crimes, namely, disorderly conduct, simple battery and solicitation of a crime. Under § 939.66, Stats. the defendant maybe convicted of an included crime. The defendant was convicted of an included offense, intermediate battery. Disorderly conduct is a crime which requires proof of in addition to those which must be proved for the crime of aggravated battery as charged and is, therefore, not an included crime. The court reject the included offense of simple battery in that there is no reasonable basis in the evidence for acquittal of aggravated battery and conviction of simple battery. The victim was very seriously injured and there was no reasonable theory at the time of the jury trial or now which would lead one to convict the defendant of simple battery and acquit him of aggravated battery. The defendant was convicted of a Class "E" felony with an enhancer provision. The defendant's counsel is no asking that the court should have submitted a Class "D" felony which carries a greater penalty. Certainly, the defendant is not prejudiced by not having had the jury consider a greater penalty crime than that for which they found him guilty. There is no reason to grant any relief on this ground.

The defendant requests a new trial on theory that the jury instruction on being party to the crime should have been given separately as to each of the offenses. The record reflects that no emphasis connected the party to a crime instruction and either count of the information. There is no showing that the jury would in any way be confused by the lack of re-reading the party to the crime instruction as to each count of the information. The court

finds no reason to grant a new trial on the basis of the party to the crime instruction as given.

A new trial is requested by the defendant on the ground that the jury instructions as read to the jury contain prejudicial errors. The first error alleged is that the court read the information as it contains the penalty citation for a felony. The number as read to the jury corresponds to a conviction for aggravated battery and theft from a person. There is no showing of prejudice, mistake or confusion by the use of the felony penalty section. There is no merit to this contention.

The next alleged prejudicial error is that the court instructed on parties to a crime and included being party to a conspiracy with another. The defendant was charged with violating § 939.05, Stats., as to both counts of the information. Under that section a person is concerned with the commission of a crime if he or she conspires with another to commit the crime. The instruction was correct and there is no merit to the contention that such instruction was prejudicial error.

The next cited error was including the party to the crime instruction as it concerned the theft from a person charge in Count Two of the information. The court finds that the jury did decide that the theft of the shoes of the victim was a natural an probable consequence of the intended crime. Again, there is no merit to this alleged error in the instructions.

The next ground for a new trial is that the court used defendant where the wording should have been principal. The defendant was not prejudiced by such wording. Such wording taken alone without being aware of the entire instruction would be to the benefit of the defendant because the jury would have been required to find that the defendant was the principal and directly committed the crime. There is no merit to the defendant's position on this matter.

There is another contention that the instructions used the word principal and not defendant. The court determines that the jury is to first determine if the principal committed the offense and then determine if the defendant was concerned in the commission of the crime committed. The instruct was correct. Again, there is no merit to this contention.

The court takes the grounds for a new trial as alleged at 6.(i), (j) and (k) of the Motions for Post Conviction Relief and determines that the arguments are without merit. The instructions correctly stated the law for the jury.

The defendant next argues that the jury verdict as to the special question on the race of the victim was "inconsistent." The court believes that it could have instructed on the lesser included verdict as to the racial question. However, from a review of both verdicts it is clear that the jury knew they had the alternative of finding if the crime was racially motivated or not. The court finds that the jury was adequately instructed.

Finally, as to the last ground for a new trial based upon erroneous instructions, the court finds that the use of the word principal in the theft from a person instruction was correct. It is the jury's duty to first determine if the principal committed the crime and then to determine if the defendant was concerned in its commission.

The next contention is that the jury verdict on Count One should be answered by the court on the racial motivation question with a "no." The court finds that the jury was adequately instructed and found that there was evidence to find that the battery was racially motivated. The court finds that there was sufficient evidence in the record for the jury to make this determination and will deny any motion for relief on this issue.

The defendant seeks a new trial for the reason that the venue of the case was changed to Walworth County upon

a motion by the defendant for change of venue. The trial counsel for the defendant was afforded the opportunity to demonstrate the racial composition of Walworth County and any law that would require a change to a county that had a similar racial composition to that of Kenosha County. The defendant has failed to demonstrate that he has been deprived in any way of a fair trial by an unbiased jury.

The defendant's position in this matter starts with the premise that a juror of a different race is presumed to be prejudiced. The position then goes on to require that a change in venue of necessity should be to a county that has a substantial population of the minority of which a defendant is a member. The position would have the court ignore the reason for the change in venue, namely prejudicial pre-trial publicity. The court here was not concerned with race, but rather with the reason for change in venue. Even if the position of the defendant is adopted, he has failed to demonstrate that the population from which the jury was drawn in his case did not have representation of his race. In his motion he even admits that the panel did have at least one juror of the same as that of the defendant. He has also failed to demonstrate that the representation of his race on panel from which his jury was selected was any different than the racial composition of the population or panel in Kenosha County.

Voir dire was provided to the defendant to seek out any prejudicial juror. There was no motion prior to the selection of the jury in regard to the racial composition of the Walworth County jury panel. Now, upon reflection the defendant says that a reasonable number of blacks were not available for the jury panel. No evidence substantiates this position. No juror was asked their personal racial composition. Moreover, how does such composition differ from that of Kenosha County. The court has in another case identified the racial composition of Kenosha County as contained in the 1980 Census. The court is aware that the chances of obtaining a black juror on the original twenty

jurors selected is approximately one in two. That is one out of every two panels of twenty jurors in Kenosha County would have a black juror on it. There is no showing that the Walworth County jury panels differ from that probability ratio.

The defendant then requests a new trial for the reason that the court did not allow exhibits to go to the jury. He cites no specific piece of evidence that was not fully viewed and examined by the jury. The court cannot find that trial counsel ever requested that any exhibits be sent to the jury. The defendant cites no request by the jury to see any particular piece of evidence. There is no reason to believe that any exhibit had any particular significance in the defendant's trial. There is no merit to the request for a new trial on the ground that the jury did not have exhibits in the jury room. Certainly, it is error to send some exhibits to the jury, including the statement of a defendant.

The defendant next requests a new trial for the reason that the court improperly prevented trial counsel from adequately examining a witness named Atkins about the plea bargain he obtained in exchange for his testimony. The witness indicated that there was no plea agreement for his testimony. The Assistant District Attorney stated on the record that there was no agreement to give the witness any consideration on his charges for his testimony. The witness indicated that it was his third time that he had the opportunity to have a driving after revocation reduced to a charge of driving without a valid driver's license. The court allowed defense counsel to go into the charge of obstructing an officer which was another charge against the witness at the time of his witnessing the defendant. The nature of that charge of lying to a police officer was gone into before the jury.

The defendant's counsel asked to go into the witness's traffic record. Objection was made and a hearing was held outside the presence of the jury. The determination of the

previous criminal record was made. The court notes that trial counsel's offer of proof from the witness did not substantiate in fact the theory of counsel that the witness was given the consideration, including avoiding of habitual offender status, for his testimony. The offer of proof does not indicate what other questions that the defendant's trial counsel could have asked and were not allowed to be ask. The court finds no merit to the position of the defendant in this regard. Trial counsel argued that the witness obtained a "deal" and was able to argue that the witness had obstructed a police officer by lying. Trial counsel for the defendant also relied on the same witness's statements as they served to show the innocence of the defendant.

The defendant asks for a new trial on the ground that he was prejudiced by evidence relating to "gangs." The record shows that trial counsel for the defendant raised the idea of a gang activity. He asked the first question concerning gangs. Objection was made by the plaintiff as to the relevancy of the "gang" activity and defendant counsel continued with his pursuit of gang questions. The position of the defendant is without merit. It was the obvious strategy of defendant to put the idea of a gang before the jury. He cannot now complain that he prejudiced the jury.

The defendant seeks a new trial on the ground that the self-serving and conflicting testimony led to his conviction. The testimonies of the various witnesses are to some degree conflicting. Certainly, the statements of some of the witnesses are self-serving. However, it was for the jury to determine the credibility of the witnesses. The conflicts in the testimonies are easily reconcilable. There is no merit to this ground for a new trial.

The plaintiff is entitled to an order denying the defendant's motion for post-conviction relief.

ORDER

Based on the foregoing decision;

IT IS HEREBY ORDERED that the defendant's motion for post-conviction relief is denied.

Dated this 9th day of October, 1990.

BY THE COURT

JEROLD W. BREITENBACH
Circuit Judge

United States Constitution, Amendment 1:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment 14:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wisconsin penalty enhancement statute:

> **939.645 Penalty; crimes committed against certain people or property. (1)** If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):
>
> (a) Commits a crime under chs. 939 to 948.
>
> (b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime under par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.

> **(2)**(a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum period of imprisonment is one year in the county jail.
>
> (b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum period of imprisonment is 2 years.
>
> (c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be increased by not more than $5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.
>
> **(3)** This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (1).
>
> **(4)** This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

Wis. Stat. § 939.645 (1989–90).

Similar State Statutes

Cal. Penal Code §§ 190.2(a)(16), 422.75(a) (West Supp. 1992);

Colo. Rev. Stat. Ann. § 18-9-121 (West Supp. 1991);

Conn. Gen. Stat. Ann. § 53a-181b (West Supp. 1992);

Ill. Ann. Stat. ch. 38, para. 12-7.1 (Smith-Hurd Supp. 1992);

Iowa Code Ann. § 729.5(3)-(4) (West Supp. 1992);

Md. Crim. Law Code Ann. § 470A(b)-(c) (1992);

Mass. Ann. Laws ch. 265, § 39 (Law. Co-op. 1992);

Mich. Comp. Laws Ann. § 750.147b (West 1991);

Minn. Stat. Ann. § 609.2231(4) (West 1987 & Supp. 1992);

Mo. Ann. Stat. § 574.093 (Vernon Supp. 1992);

Mont. Code Ann. § 45-5-222 (1991);

Nev. Rev. Stat. Ann. § 207.185 (Michie Supp. 1991);

N.H. Rev. Stat. Ann. § 651:6I(g) (1986 & Supp. 1991);

N.J. Stat. Ann. § 2C:12-1.e (West 1982 & Supp. 1992);

N.Y. Penal Law § 240.30-.31 (McKinney 1989);

Ohio Rev. Code Ann. § 2927.12 (Baldwin 1992);

Okla. Stat. Ann. tit. 21, § 850(A) (West Supp. 1992);

Or. Rev. Stat. §§ 166.155-.156 (1991);

18 Pa. Cons. Stat. Ann. § 2710 (1983)

Vt. Stat. Ann. tit. 13, § 1455 (Supp. 1991)

Wash. Rev. Code Ann. § 9A.36.080(1)(a) (West Supp. 1992);

See Also

Cal. Penal Code § 422.6 (West Supp. 1992);

Fla. Stat. Ann. § 775.085 (West 1992);

Idaho Code § 18-7902 (1987)

N.J. Stat. Ann. § 2C:44-3.e (West 1982 & Supp. 1992);

N.D. Cent. Code § 12.1-14-04 (1985);

R.I. Gen. Laws § 11-42-3 (Supp. 1991);

D.C. Code Ann. §§ 22-4001-4004 (Supp. 1992).

102D CONGRESS
2D SESSION **H.R. 4797**

To direct the United States Sentencing Commission to make sentencing guidelines for Federal criminal cases that provide sentencing enhancements for hate crimes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 7, 1992

Mr. SCHUMER introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To direct the United States Sentencing Commission to make sentencing guidelines for Federal criminal cases that provide sentencing enhancements for hate crimes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Hate Crimes Sentencing Enhancement Act of 1992".

SEC. 2. DIRECTION TO COMMISSION.

(a) IN GENERAL.--Pursuant to section 994 of title 28, United States Code, the United States Sentencing Commission shall promulgate guidelines or amend existing

guidelines to provide sentencing enhancements of not less than 3 offense levels for offenses that are hate crimes. In carrying out this section, the United States Sentencing Commission shall assure reasonable consistency with other guidelines, avoid duplicative punishments for substantially the same offense, and take into account any mitigating circumstances which might justify exceptions.

(b) DEFINITION.--As used in this Act, the term "hate crime" is a crime in which the defendant's conduct was motivated by hatred, bias, or prejudice based on the actual or perceived race, color, religion, national origin, ethnicity, gender, or sexual orientation of another individual or group of individuals.

102D CONGRESS
2D SESSION **S. 2522**

To direct the United States Sentencing Commission to make sentencing guidelines for Federal criminal cases that provide sentencing enhancements for hate crimes.

IN THE SENATE OF THE UNITED STATES

APRIL 2 (legislative day, MARCH 26), 1992

Mr. SIMON introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To direct the United States Sentencing Commission to make sentencing guidelines for Federal criminal cases that provide sentencing enhancements for hate crimes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Hate Crimes Sentencing Enhancement Act of 1992".

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(b) DEFINITION.--As used in this Act, the term "hate crime" means a crime in which the defendant's conduct was motivated by hatred, bias, or prejudice based on the actual or perceived race, color, religion, national origin, ethnicity, gender, or sexual orientation of another person or group of persons.

STATE v. WYANT
Statement of the Case

THE STATE OF OHIO, APPELLEE,
v. WYANT, APPELLANT.

THE STATE OF OHIO, APPELLANT,
v. MAY, APPELLEE.

THE STATE OF OHIO, APPELLANT,
v. STANTON ET AL, APPELLEES.

THE STATE OF OHIO, APPELLANT,
v. VAN GUNDY ET AL, APPELLEES.

[Cite as *State v. Wyant* (1992), ___ Ohio St.3d ___.

Criminal law--Ethnic intimidation--
R.C. 2927.12 unconstitutional.

The effect of R.C. 2927.12 is to create a "thought crime," in violation of Section 11, Article I of the Ohio Constitution, and the First and Fourteenth Amendments to the United States Constitution.

(Nos. 91-199, 91-1519 and 91-1211/91-1589-
Submitted April 15, 1992--
Decided August 26, 1992.)

APPEAL from the Court of Appeals
for Delaware County, No. 90-CA-2.

CERTIFIED by the Court of Appeals for Montgomery County, Nos. 12239, 12259 and 12260.

APPEAL from and CERTIFIED by the Court of Appeals for Franklin County, Nos. 90AP-473, 90AP-474, 90AP-475, 90AP-477, 90AP-478, 90AP-479 and 90AP-480.

Wyant Case: case No. 91-199

On May 29, 1989 appellant David Wyant and his wife rented campsite L-16 at Alum Creek State Park. On May 31, the Wyants' relatives came to join them, and rented L-17, the adjoining campsite. On June 2, Wyant rerented his site, but released the relatives' site, as they were to leave that day. Later in the day plans changed, and Wyant attempted to rerent site L-17. He was told that the site had been rented to someone else and so he rented L-18.

Site L-17 had been rented to the complaining witnesses, Jerry White, and his girlfriend, Patricia McGowan. White and McGowan are black; everyone in the Wyant party is white. There was little contact between the groups for most of the evening of June 2nd, but sometime between 10:30 and 11:45 p.m., White went to park officials to complain of loud music coming from the Wyant campsite. A park official went to site L-16 and asked Wyant to turn off the radio. Wyant complied.

Fifteen or twenty minutes later the radio came on again, and White and McGowan heard racial epithets and threats made in a loud voice by Wyant. Specifically, Wyant was heard to say: "We didn't have this problem until those niggers moved in next to us," "I ought to shoot that black mother fucker," and "I ought to kick his black ass." White and McGowan complained to park officials and left the park.

Wyant was indicted and convicted on one count of ethnic intimidation, R.C. 2927.12, predicated on aggravated menacing, and sentenced to one and one-half years' imprisonment. The court of appeals affirmed the conviction. The cause is before the court pursuant to the allowance of a motion for leave to appeal.

May Case: case No. 91-1519

Defendant James May, Jr. was charged with ethnic intimidation predicated on aggravated menacing. He moved to dismiss. The trial court dismissed on the grounds that R.C. 2927.12 is unconstitutional. The *May* case was consolidated with the *Plessinger/Staton* case on appeal.

Plessinger/Staton Case: case No. 91-1519

Defendants Aaron Plessinger and Mark Staton were charged with ethnic intimidation predicated on aggravated menacing. They moved to dismiss on the grounds that R.C. 2927.12 is unconstitutional, and on the authority of the court's decision in the *May* case. The trial court dismissed. Upon motion by the state, the court of appeals consolidated the *May* case with the *Plessinger/Staton* case. The court of appeals affirmed the trial court's dismissal of the ethnic intimidation charges, but reversed and remanded for prosecution on the aggravated menacing charges. Finding its judgment to be in conflict with that of the Fifth District Court of Appeals in *State v. Wyant* (Dec. 6, 1990), Delaware App. No. 90-CA-2, unreported, 1990 WL 200270, the court certified the record of the case to this court for review and final determination.

Van Gundy Case: case Nos. 91-1211/91-1589

Defendants Clancy Van Gundy, Casey Van Gundy, Franklin D. Clay, Robert Blazer, Bryan Krebs, Charles Culp, and Terry Breedlove, Jr. were each charged with seven counts of ethnic intimidation predicated on aggravated menacing. Clancy Van Gundy was also charged with felonious assault. He was tried and convicted on this charge. *See State v. Van Gundy* (1992), 64 Ohio St.3d 230, 594 N.E.2d 604. The trial court dismissed the ethnic intimidation counts, holding that R.C. 2927.12 is unconstitutional. The court of appeals affirmed, and, also finding its judgment to conflict with *State v. Wyant*,

certified the record of the case to this court for review and final determination. This cause is also before the court pursuant to a motion for leave to appeal (case No. 91-1211). We hereby allow the motion.

W. Duncan Whitney, Prosecuting Attorney, and *Sue Ann Reulbach*, for appellee in case No. 91-199.

Lee C. Falke, Prosecuting Attorney, and *Lorine M. Reid*, for appellant in case No. 91-1519.

Michael Miller, Prosecuting Attorney, *Joyce S. Anderson* and *Katherine J. Press*, for appellants in case Nos. 91-1211/91-1589.

Lee I. Fisher, Attorney General, *Simon B. Karas* and *Eric A. Walker* as supplementary counsel, for appellee in case No. 91-199 and appellants in case Nos. 91-1211/91-1589 and 91-1519.

Randall M. Dana, Ohio Public Defender, *Susan B. Gellman* and *Robert L. Lane*, for appellant in case No. 91-199.

Terry L. Lewis, for appellee James B. May, Jr. in case No. 91-1519.

Gary C. Schaengold, for appellee Mark J. Staton in case No. 91-1519.

Gary W. Crim, for appellee Aaron L. Plessinger in case No. 91-1519.

Wonnell, Janes & Wonnell Co., L.P.A., and *Harold E. Wonnell*, for appellee Clancy Van Gundy in case Nos. 91-1211/91-1589.

Andrew E. Lyles, for appellee Casey Van Gundy in case Nos. 91-1211/91-1589.

Samuel B. Weiner, for appellee Franklin D. Clay in case Nos. 91-1211/91-1589.

James Kura, Franklin County Public Defender, *Allen V. Adair* and *Carole B. Schneider*, for appellee Robert Eric Blazer in case Nos. 91-1211/91-1589.

Tyack & Blackmore Co., L.P.A., and *Thomas M. Tyack*, for appellee Bryan Krebs in case Nos. 91-1211/91-1589.

Arnold S. White, Daniel T. Kobil and *Susan B. Gellman*, for appellee Charles Culp in case Nos. 91-1211/91-1589.

Terry Breedlove, Jr., pro se, in case Nos. 91-1211/91-1589.

Bruce W. Sanford and *Robert M. O'Neil*, urging reversal for *amicus curiae*, Thomas Jefferson Center for the Protection of Free Expression in case No. 91-199.

Thomas A. Schaffer and *Annabelle Whiting Hall*, urging reversal for *amicus curiae*, National Association of Criminal Defense Lawyers in case No. 91-199, and affirmance in case Nos. 91-1211/91-1589.

Reinhart Law Office and *Harry R. Reinhart*; *Eslocker, Grim, Hodson & Dioguardi* and *Nicholette Dioguardi*, urging reversal for *amicus curiae*, Ohio Association of Criminal Defense Lawyers in case No. 91-199 and affirmance in case Nos. 91-1211/91-1589.

Kevin Francis O'Neill, Ohio Legal Director, urging reversal for *amicus curiae*, American Civil Liberties Union of Ohio Foundation, Inc. in case No. 91-199.

Robert D. Horowitz, Stark County Prosecuting Attorney, *Kristine Wilson Rohrer* and *John E. Murphy*, Executive Director; and *Paul Cox*, urging affirmance for *amici curiae*, Ohio Prosecuting Attorney's Association, Fraternal Order

of Police and Buckeye State Sheriff's Association in case No. 91-199.

Ronald J. O'Brien, City Attorney, *Marcee C. McCreary*, City Prosecutor, and *Thomas K. Lindsey*, urging reversal for *amicus curiae*, city of Columbus in case Nos. 91-1211/91-1589.

Jones, Day, Reavis & Pogue, Steven T. Catlett and *Richard A. Cordray, Schwartz, Kelm, Warren & Rubenstein* and *Nelson E. Genshaft*; *Ruth L. Lansner, Steven M. Freeman* and *Michael Sandburg*, urging reversal for *amicus curiae*, Anti-Defamation League in case Nos. 91-1211/91-1589.

Alphonse A. Gerhardstein, urging reversal for *amici curiae*. Housing Opportunities Made Equal (HOME), East Suburban Council for Open Communities, Toledo Fair Housing Center, Cincinnati Human Relations Commission and National Fair Housing Alliance in case Nos. 91-1211/91-1589.

Herbert R. Brown, J. The principal issue before us is the constitutionality of the ethnic intimidation statute, R.C. 2927.12. Before undertaking an analysis of the statute, however, we express our abhorrence for racial and ethnic hatred, and especially for crimes motivated by such hatred. We fully accept the premise which prompted the enactment of the legislation before us: that bigotry, whether expressed merely in words or by violence, does harm to its victims and to society as a whole.

The ethnic intimidation statute is a well-intentioned response to a society-threatening problem. However, the legislative response to this problem must not violate the Ohio and United States Constitutions. For the following reasons, we find R.C. 2927.12 unconstitutional.

I

The Statute

R.C. 2927.12 reads:

"(A) No person shall violate section 2903.21, 2903.22, 2909.06 or 2909.07, or division (A)(3), (4), or (5) of section 2917.21 of the Revised Code by reason of the race, color, religion, or national origin of another person or group of persons.

"(B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation."

The statute creates enhanced criminal penalties for some people who commit aggravated menacing (R.C. 2903.21),[1] menacing (R.C. 2903.22),[2] criminal damaging or endangering (R.C. 2909.06),[3] criminal mischief (R.C.

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[1]R.C. 2903.21 (aggravated menacing) reads in part:

"(A) No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of such other person or member of his immediate family."

[2]R.C. 2903.22 (menacing) reads in part:

"(A) No person shall knowingly cause another to believe that the offender will cause physical harm to the person or property of such other person or member of his immediate family."

[3]R.C. 2909.06 (criminal damaging or endangering) reads in part:

"(A) No person shall cause, or create a substantial risk of physical harm to any property of another without his consent:

"(1) Knowingly, by any means;

2909.07),[4] or certain types of telephone harassment (R.C. 2917.21[A][3], [4], or [5].[5]

"(2) Recklessly, by means of fire, explosion, flood, poison gas, poison, radioactive material, caustic or corrosive material, or other inherently dangerous agency or substance."

[4]R.C. 2909.07 (criminal mischief) reads in part:

"(A) No person shall:

"(1) Without privilege to do so, knowingly move, deface, damage, destroy, or otherwise improperly tamper with the property of another."

[5]R.C. 2917.21 (telephone harassment) reads in part:

"(A) No person shall knowingly make or cause to be made a telephone call, or knowingly permit a telephone call to be made from a telephone under his control, to another, if the caller does any of the following:

"(3) During the telephone call, violates section 2903.21 of the Revised Code;

"(4) Knowingly states to the recipient of the telephone call that he intends to cause damage to or destroy public or private property, and the recipient of the telephone call, any member of the family of the recipient of the telephone call, or any other person who resides at the premises to which the telephone call is made owns, leases, resides, or works in, will at the time of the destruction or damaging be near or in, has the responsibility of protecting, or insures the property that will be destroyed or damaged;

"(5) Knowingly makes the telephone call to the recipient of the telephone call, to another person at the premises to which the telephone call is made, or to the premises to which the telephone call is made, and the recipient of the telephone call, or another person at the premises to which the telephone call is made, has previously told the caller not to call the premises to which the telephone call is made or not to call any persons at the premises to which the telephone call is made."

The predicate offenses to ethnic intimidation are already punishable acts under other statutes. Thus the enhanced penalty must be for something more than the elements that constitute the predicate offense. Our analysis begins with the identification of the "something more" that is punished under R.C. 2927.12, but which is not an element of the underlying statutory offense. R.C. 2927.12 adds only that the violation of one of the predicate statutes be "*by reason of* the race, color, religion, or national origin of another person or group of persons." (Emphasis added.) The statute specifies no additional act or conduct beyond what is required to obtain a conviction under the predicate statutes. Thus the enhanced penalty results solely from the actor's reason for acting, or his motive.[6] We must decide whether a person's motive for committing a crime can support either a separate, additional crime, or an enhanced penalty for an existing crime.

II.

Criminalization of Motive

Motive, in criminal law, is not an element of the crime. In their textbook, 1 Substantive Criminal Law (1986) 318, Section 3.6, LaFave and Scott argue that if defined narrowly enough, motive is not relevant to substantive criminal law, although procedurally it may be evidence of guilt, or, in the case of good motive, may result in leniency. Other thought-related concepts such as intent and purpose are used in the criminal law as elements of crimes or penalty-enhancing criteria, but motive itself is not punished. *Id.* at 318-324; *see also*, *State v. Lampkin* (Oct. 3, 1990), Hamilton App. No. C-890273, unreported, at 5, 1990 WL 143466: "While motive may be relevant as a mitigating factor in the penalty phase, it is irrelevant to the guilt-phase determination * * *"; Gellman, Sticks and Stones Can Put You in Jail, but Can Words Increase Your

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[6]Webster's Ninth New Collegiate Dictionary (1984) 981, defines "reason" in part as "a rational ground or motive."

Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws (1991), 39 UCLA L.Rev. 333.

There is a significant difference between why a person commits a crime and whether a person has intentionally done the acts which are made criminal. Motive is the reasons and beliefs that lead a person to act or refrain from acting. The same crime can be committed for any of a number of different motives. Enhancing a penalty because of motive therefore punishes the person's thought, rather than the person's act or criminal intent.

Application of the Ohio and United States Constitutions to the statute before us requires careful attention to the distinctions between motive and intent as well as the line which separates a thought from an act. These distinctions can best be understood in the context of specific applications which arise in criminal jurisprudence.

A

Motive versus Criminal Intent

Culpable mental state, or intent, is usually required to find one guilty of a crime.[7] "Intent" refers to the actor's

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[7]The Ohio statute on culpable mental states, R.C. 2901.22, reads:

"(A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

"(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

"(C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards

state of mind or volition at the time he acts. Did A intend to kill B when A's car hit B's, or was it an accident? This is not the same as A's motive, which is *why* A intentionally killed B.[8] When A murders B in order to obtain B's money, A's intent is to kill and the motive is to get money. LaFave and Scott, *supra*, at 319. One can have motive without intent, or intent without motive. For instance, the wife of a wealthy but disabled man might have a motive to kill him, and yet never intend to do so. A psycopath, on the other hand, may intend to kill and yet have no motive.

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a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

"(D) A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.

"(E) When the section defining an offense provides that negligence suffices to establish an element thereof, then recklessness, knowledge, or purpose is also sufficient culpability for such element. When recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element. When knowledge suffices to establish an element of an offense, then purpose is also sufficient culpability for such element."

[8]Black's makes the distinction as well; under the definition of "intent" it states: "Intent and motive should not be confused. Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted." Black's Law Dictionary (6 Ed.1990) 810.

B

Motive versus Purpose to Commit Another Criminal Act

Purpose to commit an additional criminal act is frequently seen in criminal statutes as a basis for enhanced penalty or as creating a separate, more serious crime. For example, burglary is a trespass "with purpose" to commit a theft offense or felony.[9] Purpose in this

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[9]The Ohio statutes on aggravated burglary and burglary, respectively, state:

"2911.11 Aggravated burglary.

"(A) No person, by force, stealth, or deception, shall trespass in an occupied structure, as defined in section 2909.01 of the Revised Code, or in a separately secured or separately occupied portion thereof, with purpose to commit therein any theft offense, as defined in section 2913.01 of the Revised Code, or any felony, when any of the following apply:

"(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

"(2) The offender has a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code, on or about his person or under his control;

"(3) The occupied structure involved is the permanent or temporary habitation of any person, in which at the time any person is present or likely to be present.

"(B) Whoever violates this section is guilty of aggravated burglary, an aggravated felony of the first degree."

"2911.12 Burglary.

"(A) No person, by force, stealth, or deception, shall do any of the following:

"(1) Trespass in an occupied structure or in a separately secured or separately occupied portion thereof, with purpose to commit therein any theft offense or any felony;

"(2) Trespass in a permanent or temporary habitation of any person when any person is present or likely to be

context is not the same as motive. What is being punished is the act of trespass, plus the additional act of theft, or the intent to commit theft. Upon trespassing, A's intent is to commit theft, but the motive may be to pay debts, to buy drugs, or to annoy the owner of the property.[10] The object of the purpose is itself a crime. Thus the penalty is not enhanced solely to punish the thought or motive.

Criminal penalties are often enhanced using the concept of an aggravating circumstance. These also are distinguishable from motive. For example, under R.C. 2929.04, any of a number of aggravating circumstances can

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present, with purpose to commit in the habitation any misdemeanor that is not a theft offense;

"(3) Trespass in a permanent or temporary habitation of any person when any person is present or likely to be present.

"(B) As used in this section:

"(1) 'Occupied structure' has the same meaning as in section 2909.01 of the Revised Code;

"(2) 'Theft offense' has the same meaning as in section 2913.01 of the Revised Code.

"(C) Whoever violates this section is guilty of burglary. A violation of division (A)(1) of this section is an aggravated felony of the second degree. A violation of division (A)(2) of this section is a felony of the third degree. A violation of division (A)(3) of this section is a felony of the fourth degree."

[10]LaFave and Scott characterize purpose as a "medial end":

"* * * While some have taken the contrary view, it is undoubtedly better, for purposes of analysis, to view such crimes *as not* being based upon proof of a bad motive. This can be accomplished by taking the view that intent relates to the means and motive to the ends, but that where the end is the means to yet another end, then the medial end may also be considered in terms of intent." (Emphasis *sic*, footnotes omitted.) LaFave and Scott, 1 Substantive Criminal Law (1986) 320.

increase the penalty for aggravated murder to death.[11] Among these is murder committed "for the purpose of" escaping another offense. R.C. 2929.04(A)(3). The basis for enhancing the penalty in this case is once again an additional act or intent. Escaping another offense is in itself a crime. The enhanced penalty for murder does not stem from motive (*i.e.*, preference of life on the street to life in prison), but from the additional act of escape, or the intent to escape.

C

Motive versus Criminal Act

R.C. 2929.04(A)(2) declares murder for hire to be an aggravating circumstance. This is not properly seen as

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[11]R.C. 2929.04 reads in part:

"(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

"(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. * * *

"(2) The offense was committed for hire.

"(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

"* * *

"(6) The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer."

enhancing the penalty for a mercenary motive. Hiring is a transaction. The greater punishment is for the additional act of hiring or being hired to kill. The motive for the crime (such as jealously, greed or vengeance) is not punished.

Some aggravating circumstances involve the identity of the victim, such as a peace officer or governmental official. R.C. 2929.04(A)(1), (6). The legislature has decided, in these instances, that acts against certain individuals are more serious criminal acts. Imposing a higher penalty for killing the Governor than for killing an ordinary citizen is similar to imposing a higher penalty for stealing a painting worth $1,000 than for stealing one worth only $5.

Under the above analysis, the legislature could decide that blacks are more valuable than whites, and enhance the punishment when a black is the victim of a criminal act. Such a statute would pass First Amendment analysis because the *motive* or the thought which precipitated the attack would not be punished. However, R.C. 2927.12 could not have been written that way because such a statute would not survive analysis under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

D

Motive in the Antidiscrimination Laws

Federal and state laws against discrimination in employment, housing and education do prohibit acts committed with a discriminatory motive. However, they are analytically distinct in several ways from the statute in question here. It is the *act* of discrimination that is targeted, not the motive.

There are two theories by which a case can be made under the federal laws against employment discrimination; these are characterized as "disparate impact" and

"disparate treatment." Under a disparate-impact analysis, an employment practice that is neutral on its face, but falls more harshly on a protected group, can be used to show employment discrimination. *Griggs v. Duke Power Co.* (1971), 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158; *Teamsters v. United States* (1977), 431 U.S. 324, 335-336, 97 S.Ct. 1843, 1854-1855, 52 L.Ed.2d 396, 415, fn. 15. No discriminatory motive is necessary under this analysis.

Under a disparate-treatment analysis, the employer treats some people less favorably than others because of race, color, religion, sex or national origin. Discriminatory motive is necessary to this theory. *Id.* However, proof of discriminatory motive can be inferred from differences in treatment. *Arlington Hts. v. Metro. Hous. Dev. Corp.* (1977), 429 U.S. 252, 265-266, 97 S.Ct. 555, 563-564, 50 L.Ed.2d 450, 464-465. It is discriminatory *treatment* that is the object of punishment, not the bigoted attitude *per se*. "* * * Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Griggs*, *supra*, 401 U.S. at 432, 91 S.Ct. at 854, 28 L.Ed.2d at 165. It is the act of discrimination which is punished, not the thoughts (or bigotry) of the actor. Bigoted motive by itself is not punished, nor does proof of motive enhance the penalty when a discriminatory act is being punished.

III

The Constitutional Objection
to Punishment of Thought

Neither the United States nor the Ohio Constitution explicitly prohibits the punishment of thought. Both guarantee the right to freedom of speech.[12] Federal First

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[12]The First Amendment to the United States Constitution reads:

Amendment jurisprudence has long recognized that freedom of speech presupposes freedom of thought. As Justice Stewart said in *Abood v. Detroit Bd. of Edn.* (1977), 431 U.S. 209, 234-235, 97 S.Ct. 1782, 1799, 52 L.Ed.2d 261, 284:

> "[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."

Likewise, Justice Jackson in *West Virginia State Bd. of Edn. v. Barnette* (1943), 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628, 1639, stated as follows:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion * * *."

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 11, Article 1 of the Ohio Constitution reads:

"Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted."

And Justice Marshall in *Stanley v. Georgia* (1969), 394 U.S. 557, 565-566, 89 S.Ct. 1243, 1248-1249, 22 L.Ed.2d 542, 550, stated as follows:

> "* * * Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.
>
> "* * * [The State] cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."

Such statements are made in the context of cases in which laws regulate speech or expressive conduct of some kind. The question before us is not whether the government can regulate the conduct itself. Clearly the government can, and has already done so by criminalizing the behavior in the predicate statutes.[18] The issue here is whether the government can punish the conduct more severely based on the thought that motivates the behavior.

Under the First Amendment there are unprotected forms of expression. The state is allowed to punish those utterances that "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire* (1942), 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031, 1035. It does not follow, however, that there are unprotected forms of belief.

The freedoms of speech, press, religion and assembly are guaranteed together in the First Amendment because they share a core value: the freedom of an individual to frame his thoughts and beliefs. The Constitution of Ohio is even more specific; it guarantees to every citizen freedom to "speak, write, and publish his sentiments on all subjects."

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[18]The parties do not contest that the predicate offenses are punishable.

It follows that a citizen of Ohio is free to *have* "sentiments on all subjects."

By enacting R.C. 2927.12, the state has infringed this basic liberty. Once the proscribed act is committed, the government criminalizes the underlying thought by enhancing the penalty based on viewpoint. This is dangerous. If the legislature can enhance a penalty for crimes committed "by reason of" racial bigotry, why not "by reason of" opposition to abortion, war, the elderly (or any other political or moral viewpoint)?[14]

Within constitutional bounds, the legislature determines what constitutes a crime. We review that determination only to see if it comports with the Ohio and United States Constitutions. If the thought or motive behind a crime can be separately punished, the legislative majority can punish virtually any viewpoint which it deems politically undesirable, for example, a crime committed because the perpetrator (a) dislikes homosexuals, (b) likes homosexuals, (c) likes or dislikes the elderly--and so on. It requires little imagination to see the ramifications.

We recognize and are sensitive to the emotionally charged nature of the issues involved. We reemphasize that we in no way condone the acts and alleged acts that bring these cases before us. However, the very reason for the First Amendment and Section 11, Article I is to protect the individual against a state that is hostile simply because of the person's belief. The constitutional protection accorded to beliefs is most important when the

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[14]As Judge West of the Franklin County Court of Common Pleas said:

> "[T]his statute would enhance the punishment of a crime based upon the thoughts of the defendant, a hideous legal concept and inimical to American jurisprudence." *State v. Van Gundy* (Mar. 28, 1990), Franklin C.P. No. 89-CR-11-5166. Unreported.

beliefs are reviled by society. As Justice Douglas of this court has said:

"This guarantee of freedom is one of our most cherished rights and, as such, has been and continues to be under attack by persons, well-meaning and otherwise, who see attempted curtailment as being in the 'public good.' * * * It is important to often repeat that the freedoms * * * guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish." *Local Lodge 1297 v. Allen* (1986), 22 Ohio St.3d 228, 236, 22 OBR 407, 414, 490 N.E.2d 865, 872 (Douglas, J., concurring).

Justice Black, in his seminal dissent in *Beauharnais v. Illinois* (1952), 343 U.S. 250, 274, 72 S.Ct. 725, 739, 96 L.Ed. 919, 936, put the issue as follows:

"* * * The motives behind the state law may have been to do good. But the same can be said about most laws making opinions punishable as crimes. History indicates that urges to do good have led to the burning of books and even to the burning of 'witches.'"

Justice Black's position has become the accepted one in First Amendment jurisprudence. Justice Burger addressed the issue in *Houchins v. KQED, Inc.* (1978), 438 U.S. 1, 13, 98 S.Ct. 2588, 2596, 57 L.Ed.2d 553, 564: "We must not confuse what is 'good,' 'desirable,' or 'expedient' with what is constitutionally commanded by the First Amendment."

Applying these principles, we believe that the government is not free to punish an idea, though it may punish acts motivated by the idea. It may also punish unprotected speech expressing the idea.

The United States Supreme Court recently addressed the constitutionality of another so-called "hate crimes" law. *R.A.V. v. St. Paul* (1992), 505 U.S. ___, 112 S.Ct. 2538, 120 L.Ed.2d 305. The St. Paul ordinance reads: "Whoever

places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.'" *Id.*, 505 U.S. at ___, 112 S.Ct. at 2541, 120 L.Ed.2d at 315.

The St. Paul ordinance is aimed at specific conduct, that is, conduct which will arouse anger, alarm or resentment on the basis or race, color, creed, religion or gender. The Minnesota Supreme Court rejected an overbreadth claim because the ordinance had been construed to include only unprotected "fighting words." Despite this construction, the United States Supreme Court found the ordinance facially unconstitutional under the First Amendment. Justice Scalia, writing for the court, said that even the few limited categories of unprotected speech are not "entirely invisible to the Constitution." *Id.* at ___, 112 S.Ct. at 2543, 120 L.Ed.2d at 318. The government may not regulate even fighting words based on a hostility toward the message they contain. Any proscription of fighting words must not be based on content. The court observed that the St. Paul ordinance went beyond content discrimination to viewpoint discrimination.

Quite recently the Supreme Court of Wisconsin struck down the Wisconsin "hate crimes" statute as "unconstitutionally infring[ing] upon free speech." *State v. Mitchell* (1992), ___ Wis.2d ___, ___, 485 N.W.2d 807, 808. The Wisconsin law is a penalty-enhancement statute with some similarities to R.C. 2927.12. The Wisconsin statute does not use the phrase "by reason of," but instead permits a penalty enhancement for certain crimes when the defendant "[i]ntentionally selects" the victim "because of the race, religion, color, disability, sexual orientation, national origin or ancestry" of the victim. Wis. Stat. 939.645 (1989-90). Despite this wording, the Wisconsin court said: "[The statute] is expressly aimed at the bigoted

bias of the actor. Merely because the statute refers in a literal sense to the intentional 'conduct' of selecting, does not mean the court must turn a blind eye to the intent and practical effect of the law--punishment of offensive motive or thought." *Id.* at ___, 485 N.W.2d at 813. The analysis by the Wisconsin court applies with greater force to the Ohio statute. R.C. 2927.12 refers to the actor's reasons in direct, rather than indirect, terms and is more clearly aimed at punishment of bigoted thought.

R.C. 2927.12 constitutes a greater infringement on speech and thought than either the St. Paul or Wisconsin "hate crimes" laws. R.C. 2927.12 specifically punishes motive, and motive alone, not action or expression. The Ohio statute singles out racial and religious hatred as a viewpoint to be punished. It is the regulation of viewpoint that most particularly violates the Ohio and federal Constitutions.

Based upon the foregoing authorities and our analysis of the statute, we find that the effect of R.C. 2927.12 is to create a "thought crime." This violates Section 11, Article I of the Ohio Constitution, and the First and Fourteenth Amendments to the United States Constitution.

Conduct motivated by racial or religious bigotry can be constitutionally punished under the criminal code without resort to constructing a thought crime. In fact, the behavior which is alleged in each case before us can be punished under the criminal statutes identified in R.C. 2927.12. We agree with Justice Scalia when he observed that the government "has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." *R.A.V. v. St. Paul, supra*, 505 U.S. at ___, 112 S.Ct. at 2550, 120 L.Ed.2d at 326.

The parties also make constitutional challenges to R.C. 2927.12 on the grounds of (1) vagueness, (2) equal protection, (3) due process and (4) overbreadth. These arguments may have merit, especially in view of the

concurring opinion by Justice White in *R.A.V. v. St. Paul*, *supra*, 505 U.S. at ___, 112 S.Ct. at 2550, 120 L.Ed.2d at 327. However, because of our holding we need not address these challenges.

IV

The Specific Cases Before Us

Having so held, we turn to the specific cases which are before us. Constitutional protection of thought does not shield a citizen from punishment for proscribed acts. Although the ethnic intimidation statute is invalid, the predicate offenses are punishable. As these offenses are mentioned specifically in R.C. 2927.12, they constitute lesser included offenses to ethnic intimidation.

In case No. 91-199, the jury was instructed that it could find David Wyant guilty of ethnic intimidation only if it first found him guilty of aggravated menacing. The verdict indicates that the jury found him guilty of aggravated menacing.

In case Nos. 91-1519 and 91-1211/91-1589, although the defendants cannot be tried under R.C. 2927.12, the lesser included offenses remain viable charges.

Based on the foregoing, in case No. 91-199 we reverse the court of appeals, vacate sentence on the conviction for ethnic intimidation, and remand for sentencing on the charge of aggravated menacing. We affirm the judgment of the court of appeals in case No. 91-1519. In case Nos. 91-1211/91-1589, we affirm the dismissal for ethnic intimidation, but remand for further proceedings on the underlying aggravated menacing charges.

Judgements accordingly.

In Case Nos. 91-199 and 91-1519:

MOYER, C.J., SWEENEY, HOLMES, DOUGLAS, WRIGHT and RESNICK JJ., concur.

In Case Nos. 91-1211 and 91-1589:

MOYER, C.J., UTZ, HOLMES, DOUGLAS, WRIGHT and RESNICK, JJ., concur.

EUGENE J. UTZ, J., of the First Appellate District, sitting for SWEENEY, J.

FILED: August 27, 1992

IN THE SUPREME COURT
OF THE STATE OF OREGON

STATE OF OREGON,

Respondent on Review,

v.

DARIN DALE PLOWMAN,

Petitioner on Review.

(CC C89-12-36912; CA A65145; SC S38328)

In Banc

On review from the Court of Appeals.*

Argued and submitted March 5, 1992.

J. Marvin Kuhn, Chief Deputy Public Defender, Salem, argued the cause for petitioner on review. With him on the petition was Sally L. Avera, Public Defender, Salem.

Robert M. Atkinson, Assistant Attorney General, Salem, argued the cause for respondent on review. With him on the reponse to the petition were Charles S. Crookham, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

Rex Armstrong, of Bogle & Gates, Portland, filed a brief on behalf of *amicus curiae* ACLU Foundation of Oregon, Inc.

GRABER, J.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

*Appeal from Multnomah County Circuit Court,
James R. Ellis, Judge.
107 Or App 782, 813 P2d 1114 (1991).

GRABER, J.

INTRODUCTION

The issue in this case is the constitutional validity of ORS 166.165(1)(a)(A), the statute that creates and defines the crime of intimidation in the first degree.[1] Defendant and three codefendants were charged with violating ORS 166.165(1)(a)(A), which makes it a crime for two or more persons, acting together, to "[i]ntentionally, knowingly, or recklessly cause physical injury to another because of their perception of that person's race, color, religion, national origin or sexual orientation." Defendant demurred on the grounds that the statute is vague and that it burdens his rights to speak and to express his opinions freely.

The trial court overruled the demurrer. Defendant pleaded not guilty. A jury convicted him.[2] Defendant appealed his conviction for intimidation, contending that the trial court erred in overruling his demurrer. The Court

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[1]Defendant's challenge is only to the statutory paragraph under which he was charged: ORS 166.165(1)(a)(A). Nothing in this opinion is meant to express any view as to the constitutionality of any other portion of that statute.

[2]Defendant was also charged with, and convicted of, fourth degree assault, ORS 163.160. That statute provides in part:

> "(1) A person commits the crime of assault in the fourth degree if the person:
>
> "(a) Intentionally, knowingly or recklessly causes physical injury to another[.]"

Defendant does not dispute the validity of that conviction.

of Appeals affirmed. *State v. Plowman*, 107 Or App 782, 813 P2d 1114 (1991). We allowed review to address the important constitutional questions involved and now affirm.

The Court of Appeals stated the facts in *State v. Hendrix*, 107 Or App 734, 737-38, 813 P2d 1115 (1990), which involved one of defendant's codefendants:

> "The evidence showed that [Hendrix] and his three cohorts, [defendant], Neill and Schindler, drove to a Portland store at Southeast 136th and Powell Boulevard to buy beer. * * * [Defendant] and Neill went inside the store. [Hendrix] and Schindler walked behind the store to urinate.
>
> "Serafin and Slumano, the victims, arrived at the store in Slumano's vehicle. Serafin wanted to make a telephone call. Schindler returned to the front of the store, approached Serafin and asked him if he had any cocaine. Serafin, who speaks only a little English, said he did not have anything and started to walk away. Schindler attacked him, beating him on the head and kicking him. Neill joined Schindler in the attack. [Defendant] and [Hendrix] began beating Slumano, who was sitting in his car. [Defendant] punched Serafin; Schindler kicked him. Serafin fell to the pavement. [Hendrix] pinned Serafin's back to the pavement and repeatedly slammed the store's metal-framed glass entry door against his head. [Hendrix] and his three associates took turns beating Serafin and Slumano, sometimes ganging up three against one. Serafin and Slumano were unarmed and did not fight back. * * *
>
> "During the attack, which lasted about two minutes, eyewitnesses heard Neill shout at Serafin, 'Talk in English, motherfucker.' [Defendant] and Schindler screamed 'white power' or 'white pride' loud enough to be heard 50 feet away. [Defendant] yelled, 'Knock it off with us white boys.' When the store clerk told the assailants that she had called the police, [defendant] became even more agitated and screamed, 'They're just Mexicans' and 'They're just fucking wetbacks.' As [Hendrix] and the three cohorts sped away in their car, someone inside the car shouted 'white power.'"

CONSTITUTIONAL ISSUES

A. Vagueness Challenge under the Oregon Constitution

Defendant contends that ORS 166.165(1)(a)(A) violates Article I, sections 20 and 21, of the Oregon Constitution, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution, because its terms are vague. We analyze his contention under the Oregon Constitution first. *See State v. Kennedy*, 295 Or 260, 262, 666 P2d 1316 (1983) (courts should decide questions of state law before reaching federal constitutional issues).

"The terms of a criminal statute must be sufficiently explicit to inform those who are subject to it of what conduct on their part will render them liable to its penalties." *State v. Graves*, 299 Or 189, 195, 700 P2d 244 (1985). A "reasonable degree of certainty" about what conduct falls within the statute's prohibition is required; absolute certainty is not. *State v. Cornell/Pinnell*, 304 Or 27, 29-30, 741 P2d 501 (1987). In addition to giving fair notice of prohibited conduct, a criminal statute must not be so vague as to allow a judge or jury unbridled discretion to decide what conduct to punish. *Id.* at 29. A law that gives such unbridled discretion to judges and juries offends the principle against *ex post facto* laws embodied in Article I,

section 21, of the Oregon Constitution,[3] and the principle against standardless and unequal application of criminal laws embodied in Article I, section 20, of the Oregon Constitution.[4] *State v. Graves*, *supra*, 299 Or at 195.

Defendant's challenge is directed to the phrase "because of their perception of [the victims'] race, color, religion, national origin or sexual orientation." ORS 166.165(1)(a)(A). He argues that that phrase is "inherently nebulous and imprecise." Consequently, he asserts, it invites standardless prosecution. He claims that prosecutors will be able to charge, and juries will be able to convict, under the statute whenever the race, color, religion, national origin, or sexual orientation of the assailants differs from that of the victim. We disagree.

The crime is defined in sufficiently clear and explicit terms to apprise defendants and others of what conduct is prohibited. ORS 166.165(1)(a)(A) prohibits two or more assailants, acting together, from causing physical injury to another because the assailants perceive the victim to belong to one of the specified groups. The challenged phrase means simply that the assailants' perception need not be accurate for them to have committed the crime of intimidation in the first degree. For example, if the assailants, acting together, intentionally cause physical

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[3]Article I, section 21, of the Oregon Constitution provides in part:

> "No *ex-post facto* law, or law impairing the obligation of contracts shall ever be passed, nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution * * *."

[4]Article I, section 20, of the Oregon Constitution provides:

> "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

injury to a victim because they perceive the victim to be Catholic, the assailants have committed the crime of intimidation in the first degree even if the victim is not in fact Catholic, but is instead Episcopalian.

Defendant's assertion that the statute invites prosecution whenever the race of the assailants and the victim happen to differ misses the point in at least two respects. First, even where race is the alleged motivating factor, the perpetrators and the victim do not have to be of different races. Second, the statute requires that the assailants inflict the physical injury "because of" their perception that the victim belonged to a specified group. The statute expressly and unambiguously requires the state to prove a *causal connection* between the infliction of injury and the assailants' perception of the group to which the victim belongs. *See State v. Brown*, 310 Or 347, 353-54, 800 P2d 259 (1990) (under ORS 163.095(2)(a), defining a form of aggravated murder, the state must prove a *causal connection* between the murder and the victim's status as a witness, juror, police officer, or other person with duties to the criminal justice system); *State v. Maney*, 297 Or 620, 626, 688 P2d 63 (1984) (same). The trier of fact must find all the essential elements of the crime beyond a reasonable doubt. *State v. Williams*, 313 Or 19, 24, 828 P2d 1006 (1992).

ORS 166.165(1)(a)(A) is not unconstitutionally vague under Article I, sections 20 and 21, of the Oregon Constitution.

B. Vagueness Under the United States Constitution

Defendant argues that the statute is vague under the Constitution of the United States for the same reasons that he advances under the Oregon Constitution. The Supreme Court of the United States has interpreted the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States to prohibit the states from enforcing

vague criminal laws. *Lanzetta v. New Jersey*, 306 US 451, 59 S Ct 618, 83 L Ed 888 (1939).

A "void for vagueness" analysis under the federal constitution is much like the Oregon analysis. *State v. Robertson*, 293 Or 402, 409, 649 P2d 569 (1982). In order to withstand a vagueness challenge, a statute that defines a criminal offense must give a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited. *United States v. Murphy*, 809 F2d 1427, 1431 (9th Cir 1987) (citing *Kolender v. Lawson*, 461 US 352, 357, 103 S Ct 1855, 75 L Ed 2d 903 (1983)). Moreover, the law must provide explicit standards so that those who enforce and apply the law do not do so in an arbitrary or discriminatory fashion. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 US 489, 503, 102 S Ct 1186, 71 L Ed 2d 362 (1982). As our discussion under the Oregon Constitution reveals, ORS 166.165(1)(a)(A) does both and, accordingly, does not offend the Due Process Clause.

ORS 166.165(1)(a)(A) is not unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

C. Article I, Section 8, of the Oregon Constitution

Defendant next argues that ORS 166.165(1)(a)(A), on its face, violates Article I, section 8, of the Oregon Constitution. Article I, section 8 provides:

> "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

Defendant contends that ORS 166.165(1)(a)(A) both restrains the free expression of his opinion and also restricts his right to speak.

Defendant asserts that the intimidation law punishes the free expression of opinion, because it enhances the punishment that he otherwise would receive for an assault *solely* on the basis of his expression of his beliefs. Assault in the fourth degree, the other crime of which defendant was convicted, is a Class A misdemeanor, ORS 163.160(2), but intimidation in the first degree is a Class C felony, ORS 166.165(2). Defendant contends that the act in both crimes is the same -- assault -- and that the legislature has singled out for enhanced penalty those persons who hold particular beliefs when they commit the assault. He also argues that the statute thus restricts speech, because a violation of it "must necessarily be proved by the content of his speech or associations."

In *State v. Robertson*, *supra*, this court established a framework for evaluating whether a law violates Article I, section 8. First, the court recognized a distinction between laws that focus on the *content* of speech or writing and laws that focus on proscribing the pursuit or accomplishment of *forbidden results*. 293 Or at 416-17. The court reasoned that a law of the former type, a law "written in terms directed to the substance of any 'opinion' or any 'subject' of communication," violates Article I, section 8,

> "unless the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach." *Id.* at 412.

Laws of the latter type, which focus on forbidden results, can be divided further into two categories. The first category focuses on forbidden effects, but expressly

prohibits expression used to achieve those effects. The coercion law at issue in *Robertson* was of that category. *Id.* at 417-18.[5] Such laws are analyzed for overbreadth:

> "When the proscribed means include speech or writing, however, even a law written to focus on a forbidden effect * * * must be scrutinized to determine whether it appears to reach privileged communication or whether it can be interpreted to avoid such 'overbreadth.'" *Ibid.*

The second kind of law also focuses on forbidden effects, but without referring to expression at all. Of that category, this court wrote:

> "If [a] statute [is] directed only against causing the forbidden effects, a person accused of causing such effects by language or gestures would be left to assert (apart from a vagueness claim) that the statute could not constitutionally be applied to his particular words or other expression, not that it was drawn and enacted contrary to article I, section 8." *Id.* at 417.

Defendant characterizes ORS 166.165(1)(a)(A) as a law that expressly proscribes opinion or speech. He argues that the law might be constitutional if it proscribed a forbidden effect, but that it does not do so.

Our first task, then, is to determine whether the law is "written in terms directed to the substance of any 'opinion'

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[5]The laws upheld in *State v. Moyle*, 299 Or 691, 705 P2d 740 (1985) (harassment, formerly ORS 166.065(1)(d), now ORS 166.065(1)(c)), and *State v. Garcias*, 296 Or 688, 679 P2d 1354 (1984) (menacing, ORS 163.190(1)), and the laws struck down in *State v. Spencer*, 289 Or 225, 661 P2d 1147 (1980) (disorderly conduct, *former* ORS 166.025(1)(c), *repealed by* Or Laws 1983, ch 546, § 5), and *State v. Blair*, 287 Or 519, 601 P2d 766 (1979) (harassment, ORS 166.065(1)(c), *amended by* Or Laws 1981, ch 468, § 1), also were of that category.

or any 'subject' of communication." *State v. Robertson*, *supra*, 293 Or at 412. We conclude that it is not. ORS 166.165(1)(a)(A) contains four elements: (1) Two or more persons must act together; (2) they must act because of their perception of the victim's race, color, religion, national origin, or sexual orientation; (3) they must cause physical injury to the victim; and (4) they must cause the physical injury intentionally, knowingly, or recklessly. Persons can commit that crime without speaking a word, and holding no opinion other than their perception of the victim's characteristics.

Defendant's primary argument is that the second element proscribes opinion, because it enhances the penalty for assault based entirely on the assailants' beliefs. First, we disagree with defendant that the crime defined by ORS 166.165(1)(a)(A) differs from assault *solely* because the attack was precipitated by the assailants' perception that the victim belonged to a specified group. Another element of the crime differentiates intimidation in the first degree from fourth degree assault. The first element of intimidation in the first degree is that two or more persons act together. There is no similar requirement in fourth degree assault. *See* ORS 163.160(1)(a) (quoted in note 2, *supra*).

We also reject the broader argument that ORS 166.165(1)(a)(A) proscribes opinion. Rather than proscribing opinion, that law proscribes a forbidden effect: the effect of acting together to cause physical injury to a victim whom the assailants have targeted because of their perception that that victim belongs to a particular group. The assailants' opinions, if any, are not punishable as such. ORS 166.165(1)(a)(A) proscribes and punishes committing an act, not holding a belief. Put differently: One may hate members of a specified group all one wishes, but still be punished constitutionally if one acts together with another to cause physical injury to a person because of that person's perceived membership in the hated group.

(Indeed, one need not hate at all to commit this crime; one need only meet the four elements stated above.)

In enacting the intimidation statute, the legislature determined that the potential for harm is greater when two or more assailants act together than when an assailant acts alone and that causing physical injury to a victim because of the perception that the victim belongs to one of the specified groups creates a harm to society distinct from and greater than the harm caused by the assault alone. Such crimes -- because they are directed not only toward the victim but, in essence, toward an entire group of which the victim is perceived to be a member -- invite imitation, retaliation, and insecurity on the part of persons in the group to which the victim was perceived by the assailants to belong. Such crimes are particularly harmful, because the victim is attacked on the basis of characteristics, perceived to be possessed by the victim, that have historically been targeted for wrongs.[6] Those are harms that the legislature is entitled to proscribe and penalize by criminal laws.

We next address defendant's contention that ORS 166.165(1)(a)(A), in effect, proscribes communication, because "it must necessarily be proved by the content of his speech or associations." As we have noted, it is not an element of the crime that communication occur; defendant appears to concede that the crime does not *expressly*

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[6]The statute was first enacted in 1981 at the request of then-Governor Vic Atiyeh. Minutes, House Judiciary Committee, Subcommittee 1, April 14, 1981, Exhibit A, Testimony of Bob Oliver, Legal Counsel to the Governor. Governor Atiyeh sponsored the measure out of concern that assault coupled with the requisite intent is more likely than other assault to result in retaliatory violence and to threaten social order. House Committee on Judiciary, Subcommittee 1, March 9, 1983, HB 2803, Exhibit C, p 2. *See also* House of Representatives, Judiciary Committee, Staff Measure Analysis, prepared by the Committee's Legal Counsel (discussing purpose of bill).

proscribe communication. The answer to defendant's argument that ORS 166.165(1)(a)(A), *in effect*, proscribes communication is twofold.

First, ORS 166.165(1)(a)(A) need not be proved by speech or associations. For example, if the state showed that every Saturday night for two months the defendants traveled to an area with a large Hispanic population and assaulted a Hispanic person, the trier of fact could infer that the defendants intended to cause physical injury to the present victim because he is perceived to be Hispanic.

Second, there is a distinction between making speech the crime itself, or an element of the crime, and using speech to prove the crime. As discussed earlier in this opinion, a defendant who makes a facial challenge to a statute under Article I, section 8, must demonstrate the former -- that the legislature intended to punish the speech itself. *State v. Robertson*, *supra*.

Speech is often used to prove crimes that do not proscribe speech, particularly the intent element of those crimes. For example, if an assailant grabs a woman's arm and strikes her, stating "I am going to kill you," the state can use the assailant's words to prove the crime of attempted murder, because the words reveal the necessary intent. *See* ORS 163.115 (defining murder); ORS 161.405 (a person is guilty of an attempt to commit a crime when the person intentionally engages in conduct which constitutes a substantial step toward commission of the crime). But the words themselves are not an element of the crime of attempted murder; they simply make the required intent manifest. When the assailant has committed the act with the necessary intent, the assailant has committed the crime, whether or not the assailant spoke. Similarly, if assailants yell racial epithets while acting together to cause physical injury to a victim whom they perceive to be a member of the race at which the epithets are aimed, their words can be used to prove their perception of the victim's race and their intention to cause

physical injury to the victim because of that perception, but the words themselves are not an element of the crime.

Defendant's argument that ORS 166.165(1)(a)(A) is facially invalid under Article I, section 8, of the Oregon Constitution fails.

D. First Amendment

Defendant contends that ORS 166.165(1)(a)(A) "punishes speech" and, therefore, offends the First Amendment to the Constitution of the United States. He offers no independent analysis under the First Amendment, but relies on the arguments that he articulated in his challenge under Article I, section 8, of the Oregon Constitution.

The First Amendment provides in part:

> "Congress shall make no law * * * abridging the freedom of speech * * *."[7]

The First Amendment generally prevents government from proscribing speech or expressive conduct because of disapproval of the ideas expressed. *R.A.V. v. City of St. Paul*, 112 US 2538, ___ S Ct ___, ___ L Ed 2d ___ (1992). The defendant in that case had been charged with violating a St. Paul, Minnesota, ordinance prohibiting the placement on public or private property of a symbol that one knows or should know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or sex. The Supreme Court of the United States held that "the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." 112 S Ct at 2542.

[7]The First Amendment is made applicable to the states by the Due Process Clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 US 652, 45 S Ct 625, 69 L Ed 1138 (1925).

The Court distinguished laws, such as the St. Paul ordinance, that are directed against the substance of speech from laws that are directed against conduct. With respect to the latter, the Court wrote:

> "Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." 112 S Ct at 2546-47.

As discussed in Part II C, *ante*, ORS 166.165(1)(a)(A) is a law directed against conduct, not a law directed against the substance of speech. In *R.A.V.*, the Court expressly did not rule on the constitutionality under the First Amendment of a statute like the one that we consider here. The defendant in *R.A.V.* also had been charged with violating a Minnesota statute that punishes racially motivated assaults, but he did not challenge that statute. 112 S Ct at 2542 n 2.

The Wisconsin Supreme Court has ruled on the constitutionality of a law punishing racially motivated assaults. That court recently held that Wisconsin's intimidation statute is unconstitutional under the First Amendment. *State v. Mitchell*, 169 Wis 2d 153, 485 NW2d 807 (1992). That statute increases the penalties for certain underlying crimes if the actor "[i]ntentionally selects the person against whom the crime * * * is committed * * * because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person." *Id.* at ___ n 1. The majority of that court reasoned that the Wisconsin statute punishes the defendant's biased thought. The majority further reasoned that the statute punishes speech, because the element of discriminatory selection of the victim is generally proved by evidence of the defendant's speech. Because of our analysis of the way in which ORS 166.165(2)(a)(A) functions, see Part II C, *ante*, we disagree with that reasoning.

We also note a distinction between the statute at issue in this case and the statute considered in *State v. Mitchell*, *supra*. As discussed above, ORS 166.165(1)(a)(A) contains the requirement that two or more people act together. The statute in question in *Mitchell* did not contain that requirement. *Id.* at ___ n 1.

To summarize, in our analysis under the Oregon Constitution, we concluded that ORS 166.165(1)(a)(A) does not proscribe speech or target conduct on the basis of its expressive content. Accordingly, we conclude that ORS 166.165(1)(a)(A) does not violate the First Amendment to the Constitution of the United States.

CONCLUSION

ORS 166.165(1)(a)(A) is not void for vagueness under either Article I, sections 20 or 21, of the Oregon Constitution, or the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. Neither does ORS 166.165(1)(a)(A) on its face offend Article I, section 8, of the Oregon Constitution, or the First Amendment to the Constitution of the United States.

The decision the Court of Appeals and the judgment of the circuit court are affirmed.